

Message

Sent: 7/22/2019 8:10:10 PM
To: Willey, Katharine [willey.katharine@epa.gov]
Subject: RE: Comment on senators' FOIA letter?

From: Willey, Katharine
Sent: Monday, July 22, 2019 4:09 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: RE: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Monday, July 22, 2019 3:53 PM
To: Willey, Katharine <willey.katharine@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: Re: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jul 22, 2019, at 3:38 PM, Willey, Katharine <willey.katharine@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

On Jul 22, 2019, at 3:35 PM, Jackson, Ryan <jackson.ryan@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Monday, July 22, 2019 3:25 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: FW: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Alex Guillen <aguillen@politico.com>
Sent: Monday, July 22, 2019 3:22 PM
To: Press <Press@epa.gov>
Subject: Comment on senators' FOIA letter?

Hello,

I'm writing a Whiteboard item on today's [letter](#) to EPA from a bipartisan group of senators regarding EPA's recent FOIA regulation update. The rule "purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA," they wrote. Does EPA have a response to the senators?

Thanks,

Alex Guillen | Energy Reporter | **POLITICOPRO**
1000 Wilson Boulevard, 8th Floor | Arlington, VA 22209
Phone: 703.341.4619
Email: aguillen@politico.com | Twitter: [@alexaguillen](https://twitter.com/alexaguillen) | Website: www.POLITICOPRO.com

Message

Sent: 6/25/2019 8:08:40 PM
To: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Epp, Timothy [Epp.Timothy@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: RE: CNN INQUIRY

Ex. 5 Deliberative Process (DP)

-----Original Message-----

From: Abboud, Michael
Sent: Tuesday, June 25, 2019 4:02 PM
To: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Epp, Timothy <Epp.Timothy@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>
Subject: FW: CNN INQUIRY

Ex. 5 Deliberative Process (DP)

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 4:00 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: RE: CNN INQUIRY

One more question

Can I get this part of what you said earlier on the record or at least on background if possible --

EPA appealed to OMB to use the good cause amendment in this rule's case in order to skip the proposed rule and comment period normally required when changing federal rules. OMB said that EPA met the good cause amendment requirements in the APA and allowed them to bypass this part of the normal federal rulemaking process, which is why the rule is being released as a final rule.
(this is just me paraphrasing what you said, feel free to change if I am not representing this accurately)

-----Original Message-----

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, June 25, 2019 3:55 PM
To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Cc: Press <Press@epa.gov>
Subject: RE: CNN INQUIRY

Yeah here you are, give me a call if you have any questions. Also see our press release from earlier today for more information: https://urldefense.proofpoint.com/v2/url?u=https-3A_www.epa.gov_newsreleases_hill-2Dgets-2Dit-2Dwrong-2Dnew-2Ddepa-2Dfoia-2Dregulation&d=DwIGaQ&c=W8uiIUYdLnv14aAum30ieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsCiz4DkVTH00&m=ionJFXHZLkg6G8aM_a-KAB78ixLgNEckA6TjAx67G1E&s=3QFZQGWHYZUFCbJq9rpiSmkM8LSRYjCVIZUs2yLLWoQ&e=

"The Agency has determined that the changes in this Rulemaking qualify for either the good cause or procedural exceptions to the Administrative Procedure Act's notice and comment requirements. The changes in the Rulemaking bring EPA's regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the Agency's internal organization, procedure, or practice." - EPA spokesman

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 3:04 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Cc: Press <Press@epa.gov>
Subject: RE: CNN INQUIRY

We are planning to publish this afternoon. If you could get us something in the next hour or two that would be great. Thanks!

-----Original Message-----

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, June 25, 2019 3:03 PM
To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Cc: Press <Press@epa.gov>
Subject: Re: CNN INQUIRY

Give me a few minutes and I'll have it over. When's your deadline?

Sent from my iPhone

> On Jun 25, 2019, at 3:00 PM, Kaufman, Ellie <Ellie.Kaufman@turner.com> wrote:

>

> Michael,

>

> Is this the final rule that goes into effect tomorrow?

> https://urldefense.proofpoint.com/v2/url?u=https-3A__s3.amazonaws.com_public-2Dinspection.federalregister.gov_2019-2D13290.pdf-3Futm-5Fmedium-3Demail-26utm-5Fcampaign-3Dpi-2Bsubscription-2Bmailing-2Blist-26utm-5Fsource-3Dfederalregister.gov&d=DwIGaQ&c=W8uiIUYdLnV14aAum3Oieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsCiz4DkVTH00&m=1nHacDHqS-MB6KNFYCjtEsn9UupkcgmvCG59Uq2joTU&s=GazHNoZLLV_hcjd94U41qfa6ervTkxzHiSBKh9P2MLM&e=

>

> It's already published in the federal register, I believe.

>

> Also, can you tell me again what the APA clause you mentioned on the phone was that you said you all used to not have a proposed rule/public comment period for this rule?

>

> If you have an on the record statement about this, please share it with me. We are going to file on this.

>

> Thanks,

> Ellie

>

> -----Original Message-----

> From: Kaufman, Ellie

> Sent: Tuesday, June 25, 2019 12:44 PM

> To: press@epa.gov

> Subject: CNN INQUIRY

>

> Hello,

>

> I see that a final rule regarding the FOIA process is going into effect tomorrow. Can you tell me more about this rule? Why is EPA updating the FOIA rule? What are the major changes?

>

> Thanks!

>

> Ellie Kaufman

> CNN Washington

> Ex. 6 Personal Privacy (PP)

>

> Sent from iPhone

Message

Sent: 6/26/2019 1:27:55 PM
To: Wallace, Gregory [gregory.wallace@turner.com]; Kaufman, Ellie [Ellie.Kaufman@turner.com]
CC: Konkus, John [konkus.john@epa.gov]
Subject: FW: CNN: EPA changes transparency rules

A couple issues with your article below.

First the Administrator and all staff at the Agency have always been able to review their documents before they are released, this is not new to this administration and not new in this rule. The awareness review process allows all EPA staffers to review their responsive records before they are released and this is in line with the previous administration's practices as well. Career staffers are still the ones handling the FOIA and compiling the responsive records.

I'm asking you to change the green highlighted sentence as it is a misleading characterization of what actually happened last year. Nowhere in the article you linked to does it say anything remotely close to that. If you want to say that Congressional Democrats accuse the Agency of "slow-walking" that is fine, but Jackson never said anything of the sort.

From: Kazempoor, Kelly
Sent: Wednesday, June 26, 2019 9:17 AM
To: AO OPA Individual News Clips <AO_OPA_Ind_News_Clips@epa.gov>
Subject: CNN: EPA changes transparency rules

CNN

EPA changes transparency rules

<https://www.cnn.com/2019/06/26/politics/epa-foia-rule/>

By Gregory Wallace and Ellie Kaufman

The Environmental Protection Agency is making changes to its transparency rules that include explicitly granting the administrator the authority to decide which public records the agency will release or withhold.

The change in the Freedom of Information Act rule comes without the normal process of public input. It was not announced but instead was placed in the Federal Register for formal publication.

The rule change appears to allow, for example, the administrator to personally review his own documents, such as emails and calendars, and decide what to release and what to withhold, though he still must comply with the applicable laws governing the release of public documents. At federal agencies, that process is typically in the hands of career employees and attorneys.

The EPA says it has fielded an unprecedented level of requests under the Trump administration, and some of its disclosures under FOIA have resulted in embarrassing revelations about agency leadership and actions.

Political appointees at the Trump administration EPA have taken a keen interest in the handling of FOIA requests, even acknowledging instances where the process was tinged with political influence. Chief of staff Ryan Jackson testified last summer that he and aides would slow-walk "politically charged" requests, according to congressional Democrats.

The rule change adds the administrator to the enumerated list of political appointees who can personally review requests and make "final determinations," the decisions about which records fall within the scope of the request and how to redact those documents.

Administrator Andrew Wheeler came into office last summer placing a "premium on transparency," his spokesman said. His predecessor Scott Pruitt had kept "secret" calendars concealing his controversial meetings from public documents, a whistleblower revealed.

The rule change also centralizes the records process, blocking the EPA's network of regional offices from accepting FOIA requests, as is currently done. Those requests will not be considered "received by the Agency," the rule states.

The rule was also posted without a period for public comment, a normal procedure in the creation of federal regulations. The EPA said it was justified in doing so because the revisions "do not change the substantive standards" it uses and it cited a federal law that exempts changes to internal agency procedures from public comment periods.

The agency said in a statement that the changes "will bring the Agency into compliance with the Congressional amendments" to the original Freedom of Information Act law. "Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations, the Obama administration failed to meet this deadline," the statement said.

American Oversight, a left-leaning watchdog group that has repeatedly taken the Trump administration to court over slow responses to public records requests, said in a statement, "Giving appointees a political veto over transparency is a recipe for obstruction and deceit."

"Nothing the EPA has done under this administration suggests its top leadership should be trusted to serve as intermediaries of the truth," executive director Austin Evers said in the statement. "Public records belong to the public, not the government, and one of the strengths of the Freedom of Information Act is that it lets nonpartisan experts release information based on the law, not politics."

The Sierra Club, which obtained tens of thousands of pages of internal EPA records through the Freedom of Information Act, said the revelations "may never have come to light with this change."

"The only good news about this rule is that it is obviously and in-your-face illegal, and we will fight it tooth and nail," said Pat Gallagher, of the group's environmental law program.

The Interior Department has also expanded political reviews of FOIA requests, including silently establishing an additional layer of review by political appointees and proposing limits on the number of requests a person or group can make. The Interior Department disputes that it has a secret review process and says its proposed changes are in the name of efficiency.

Message

Sent: 6/25/2019 7:08:37 PM
To: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Epp, Timothy [Epp.Timothy@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Konkus, John [konkus.john@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: FW: CNN INQUIRY

Tim and Joe --

Is it it

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 3:04 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Cc: Press <Press@epa.gov>
Subject: RE: CNN INQUIRY

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-----Original Message-----

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, June 25, 2019 3:03 PM
To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Cc: Press <Press@epa.gov>
Subject: Re: CNN INQUIRY

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Sent from my iPhone

> On Jun 25, 2019, at 3:00 PM, Kaufman, Ellie <Ellie.Kaufman@turner.com> wrote:
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> Is this the final rule that goes into effect tomorrow?
> https://urldefense.proofpoint.com/v2/url?u=https-3A__s3.amazonaws.com_public-2Dinspection.federalregister.gov_2019-2D13290.pdf-3Futm-5Fmedium-3Demail-26utm-5Fcampaigh-3Dpi-2Bsubscription-2Bmailing-2Blist-26utm-5Fsource-3Dfederalregister.gov&d=DwIGaQ&c=w8uiUydlNv14aAum3Oieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsCiz4DkVTH00&m=1nHacDHqS-MB6KNFYCjtEsn9UupkcgmvcG59Uq2joTU&s=GazHNoZLLV_hcjd94U41qfa6ervTkxzHiSBKh9P2MLM&e=
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> -----Original Message-----
> From: Kaufman, Ellie
> Sent: Tuesday, June 25, 2019 12:44 PM
> To: press@epa.gov
> Subject: CNN INQUIRY
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>
> Thanks!
>
> Ellie Kaufman
> CNN Washington
> **Ex. 6 Personal Privacy (PP)**
>
> Sent from iPhone

Message

Sent: 6/27/2019 5:39:05 PM
To: Jackson, Ryan [jackson.ryan@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]
CC: Konkus, John [konkus.john@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: FW: EPA's Response to Society of Environmental Journalists Letter - Preview

Below is the draft, **Ex. 5 Deliberative Process (DP)**

From: EPA Press Office <press@epa.gov>
Sent: Thursday, June 27, 2019 1:37 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: EPA's Response to Society of Environmental Journalists Letter - Preview

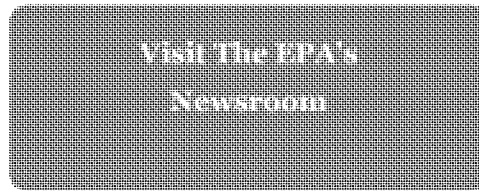
Microsoft Word document: EPA's Response to Society of Environmental Journalists Letter - Preview.docx

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Signed by, XXXX



U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004



[Unsubscribe](#)

Message

From: abboud.michael@epa.gov [abboud.michael@epa.gov]
Sent: 7/23/2019 10:27:35 PM
To: Miranda Green [mgreen@thehill.com]
CC: Press [Press@epa.gov]
Subject: Re: Cornyn actions on EPA FOIA rule?

“Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA’s FOIA program. After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests.

Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” –

Michael Abboud, EPA spokesman

Sent from my iPhone

On Jul 23, 2019, at 6:18 PM, Miranda Green <mgreen@thehill.com> wrote:

Looking for a comment on this FOIA bill introduced this evening.

Thanks,
Miranda

Miranda Green

Ex. 6 Personal Privacy (PP)

Mgreen@thehill.com

@mirandacgreen

Begin forwarded message:

From: "Yezbick, Natalie (Cornyn)" <Natalie_Yezbick@cornyn.senate.gov>

Date: July 23, 2019 at 5:54:42 PM EDT

To: 'Miranda Green' <mgreen@thehill.com>

Subject: RE: Cornyn actions on EPA FOIA rule?

Hi Miranda,

Wanted to forward along the release Sen. Grassley’s office just sent out.

FOR IMMEDIATE RELEASE

Tuesday, July 23, 2019

Grassley, Leahy, Cornyn, Feinstein Introduce Bill to Reinforce Transparency in
Wake of Supreme Court FOIA Decision and Recent Regulations

WASHINGTON – Senator Chuck Grassley (R-Iowa) today, along with Senators Patrick Leahy (D-Vt.), John Cornyn (R-Texas), and Dianne Feinstein (D-California), introduced the *Open and Responsive Government Act* (S. 2220), to reverse recent developments that undermine the public’s right to access information and hold government accountable. The legislation would restore a

longstanding legal interpretation of the Freedom of Information Act's (FOIA) exemption regarding confidential commercial information, which was recently cast aside by the Supreme Court. It would also respond to recent regulatory actions by making clear that any information which does not otherwise fall within one of FOIA's nine exemptions *should be made public*—thus, reinforcing FOIA's presumption of openness and transparency.

“The people’s business ought to be available to the people. It’s only through public oversight and transparency that we ensure government programs are operating as intended, without any waste, fraud, or abuse. Transparency is something worth fighting for, and it seems we’re always in an uphill battle to keep the sunlight shining on government. This balanced and bipartisan bill responds to recent court rulings and regulatory actions, restoring pro-transparency principles and making crystal clear where Congress stands on the public’s right to know,” **Grassley said.**

“Protecting the American people’s right to access information from and about their government – a fundamental right in any self-governed society – is a longstanding, bipartisan priority. That’s exactly why a bipartisan group of senators came together and introduced the Open and Responsive Government Act of 2019 today. Our bill is a targeted, commonsense step to bolster our premier transparency law, the Freedom of Information Act. The bill would limit the extent to which the government can use a recent Supreme Court opinion to justify abuses of a particular FOIA exemption to withhold information. And it would codify another court decision – one that the Trump administration increasingly ignores – prohibiting the government from withholding information on the tenuous rationale that it is supposedly not responsive to the FOIA request. I am proud to take part in introducing this bill and to continue our bipartisan efforts to keep our government open to the people it serves,” **Leahy said.**

“The Freedom of Information Act is a cornerstone of our country’s belief in open and transparent government. As court rulings are released and case law changes, updates like this must be made to FOIA to improve compliance and ensure Americans can continue to hold those who represent them accountable,” **Cornyn said.**

“Companies shouldn’t be allowed to hide information about how they’re spending federal funds or using federal property. Doing so would prevent the public from holding companies accountable for wasting taxpayer funds. This commonsense legislation restores the standard under which we’ve operated for 40 years and provides the public with the ability to know how taxpayer dollars are being spent,” **Feinstein said.**

In June, the Supreme Court in *Food Marketing Institute v. Argus Leader Media* ruled that a longstanding interpretation of FOIA’s Exemption 4—often called the *National Parks* standard—is inconsistent with FOIA’s text and structure. For decades, the *National Parks* standard made clear that information may only be withheld from the public as “confidential” under Exemption 4 if its disclosure would cause “substantial competitive harm” to the person or entity that provided that information to the government. By setting aside this standard, the Court’s decision significantly broadens the scope of Exemption 4, making it more difficult for the media and general public to learn about government programs and hold

accountable those who administer them. To rectify this, the *Open and Responsive Government Act* updates FOIA Exemption 4 to include key accountability language from *National Parks*, ensuring continued access to information.

The legislation also codifies a 2016 holding by the U.S. Court of Appeals for the District of Columbia to make clear that FOIA's nine exemptions are the *only* authority under which agencies may redact information in otherwise responsive records. In *American Immigration Lawyers Association v. Executive Office for Immigration Review*, the court made clear that redacting information as simply "non-responsive" within an otherwise responsive record "cannot be squared with [FOIA's] statutory scheme." Recent regulatory actions, however, appear to conflict with that holding and grant authority "to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness...." The bill responds to these developments by making the D.C. Circuit's holding the rule, not the exception.

In March, Grassley, Leahy, Cornyn and Feinstein expressed concern about a continued culture of secrecy within the federal bureaucracy that has spanned many administrations. They recently criticized a new Environmental Protection Agency rule potentially undermining access to certain material. Proposed rules by the Department of the Interior were also the subject of criticism from transparency advocates.

The *Open and Responsive Government Act* is the just most recent of Senator Grassley's longstanding efforts to respond to decisions by federal courts that undermine accountability, transparency, or other congressional intent. In 2018 and 2019, Senator Grassley introduced or sponsored legislation to close loopholes in the Anti-Terrorism Act of 1992—a law he authored—after court decisions limited the ability of American victims of terrorism to seek justice. In 2017, Senator Grassley's *Family Farmer Bankruptcy Clarification Act* became law, following bipartisan work to respond to a 2012 decision by the Supreme Court that ignored Congress' express goal of helping family farmers.

Text of the *Open and Responsive Government Act* is available [HERE](#).

-30-

Best,

Natalie Yezbick
Press Secretary
Senator John Cornyn (R-TX)

From: Miranda Green <mgreen@thehill.com>
Sent: Tuesday, July 23, 2019 3:13 PM
To: Yezbick, Natalie (Cornyn) <Natalie_Yezbick@cornyn.senate.gov>
Subject: Re: Cornyn actions on EPA FOIA rule?

Hi Natalie,

Looking for an update on this and a time for when the bill is intended to be released?

I have a copy of a draft of it, but would like to make sure it's the most recent version before posting and to give you all the opportunity to provide statements from your Senators.

Thanks,
Miranda

On Tue, Jul 23, 2019 at 10:02 AM Yezbick, Natalie (Cornyn)
<Natalie_Yezbick@cornyn.senate.gov> wrote:

Hey Miranda,

We will get you something on this as soon as we can.

Best,

Natalie Yezbick

Press Secretary

Senator John Cornyn (R-TX)

From: Miranda Green <mgreen@thehill.com>
Sent: Tuesday, July 23, 2019 9:57 AM
To: Yezbick, Natalie (Cornyn) <Natalie_Yezbick@cornyn.senate.gov>
Subject: Re: Cornyn actions on EPA FOIA rule?

Hi Natalie,

I've been told the FOIA reform bill is being announced today and Cornyn is a co-signer, can I get a sneak peak of the text, since I've been following this from the get go? Also any press release you have ready.

Thanks,

On Mon, Jul 22, 2019 at 3:30 PM Miranda Green <mgreen@thehill.com> wrote:

Thanks for sending over Natalie.

On Mon, Jul 22, 2019 at 3:28 PM Yezbick, Natalie (Cornyn)
<Natalie_Yezbick@cornyn.senate.gov> wrote:

Hey Miranda,

Below is the letter Sen. Leahy's office released a few minutes ago.

NEWS from
Senator Patrick Leahy | Senator Chuck Grassley
Senator Dianne Feinstein | Senator John Cornyn

**Senators Leahy, Grassley, Feinstein, And Cornyn
Raise Concerns About EPA's FOIA Rule**

*...Senators Ask EPA To Reconsider FOIA Rule Or Provide
Sufficient Opportunity For Public Comment And Transition Period*

(MONDAY, July 22, 2019) — Senators Patrick Leahy (D-Vt.), Chuck Grassley (R-Iowa), Dianne Feinstein (D-Calif.), and John Cornyn (R-Texas) — all senior members of the Senate Judiciary Committee with exclusive jurisdiction over the Freedom of Information Act (FOIA) — sent a bipartisan letter to Environmental Protection Agency (EPA) Administrator Andrew Wheeler raising serious concerns with the EPA's recent "FOIA Regulations Update" final rule, asking him to reconsider the rule or provide sufficient opportunity for the American public to comment on it and additional transition time to ensure public awareness.

The Senators wrote: "We write to express significant concerns about the "FOIA Regulations Update" final rule promulgated by the Environmental Protection Agency (EPA) — without any opportunity for public comment — on June 26, 2019. While we appreciate the agency's commitment to updating its regulations in response to recent FOIA amendments, the rule purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA."

The Senators requested: "Given the potentially serious issues we have identified above, we urge you to reconsider your implementation of—or provide sufficient opportunity for public comment on—the "FOIA Regulations Update" final rule. At minimum, we urge you to at least provide additional transition time to ensure that the public and requesters are fully aware of the nature and impact of these policy changes. Thank you for your attention to this critical issue."

Full text of the letter follows:

#

CONTACT:

David Carle (w/Leahy), 202-224-3693

Taylor Foy (w/Grassley), 202-224-6708

Tom Mentzer (w/Feinstein), 202-224-9629

Natalie Yezbick (w/Cornyn), 202-224-0704

July 22, 2019

Andrew Wheeler, Administrator

U.S. Environmental Protection Agency

Office of the Administrator, Mail Code 1101A

1200 Pennsylvania Avenue NW

Washington, DC 20460

Dear Administrator Wheeler,

We write to express significant concerns about the “FOIA Regulations Update” final rule promulgated by the Environmental Protection Agency (EPA) – without any opportunity for public comment – on June 26, 2019.[1] While we appreciate the agency’s commitment to updating its regulations in response to recent FOIA amendments, the rule purports to make numerous changes to the EPA’s FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people’s right to access information from the EPA.

First, the rule expressly cites political appointees – including but not limited to the EPA Administrator and his Deputy Administrators – as authorized to “issue final determinations whether to release or withhold” documents in response to FOIA requests.[2] We note that the EPA’s operative memorandum setting forth the agency’s “awareness notification process” – by which senior agency officials are made aware of the release of certain information through FOIA – makes clear that such a process is “not an approval process” and that “FOIA staff...determine whether information should be released or withheld” under FOIA.[3] This new rule, however, appears to supersede that memorandum, affirming political appointees’ power to decide what information is released or withheld in response to FOIA

requests. While FOIA does not preclude this authority, experience under the Obama administration and prior administrations shows that the involvement of political appointees making determinations can add unnecessary delays to the review process, potentially violating FOIA's statutory deadlines. Expressly affirming appointees' authority to issue final determinations may embolden future senior officials and increase the chances – under any administration – that final FOIA determinations are unnecessarily delayed or driven by political considerations rather than the law.

Second, the rule requires that all FOIA requests be sent to the EPA's headquarters in Washington, D.C.[4] This effectively sidelines the EPA's regional offices, which may previously have been the point of easiest access for many requesters. Making matters worse, the rule does not require the EPA to inform requesters that a request has been erroneously submitted to an EPA program or regional office. Rather, "the EPA will not consider the request received by the Agency." [5] We are concerned that this hard and fast rule – without further notice procedures – may leave requesters accustomed to submitting requests to a regional office unaware their request will never receive a response.

Third, the rule appears to provide the EPA with authority to withhold information in violation of controlling legal precedent on FOIA. The rule authorizes officials or their delegates to "release or withhold a record *or a portion of a record* on the basis of *responsiveness*." [6] This appears to directly conflict with a 2016 decision by the D.C. Circuit, which found "no statutory basis for redacting ostensibly non-responsive information from a record deemed responsive." [7] Rather, "the sole basis on which [an agency] may withhold particular information within that record is if the information falls within one of the statutory exemptions from FOIA's disclosure mandate." [8] This ruling prevents agencies from withholding portions of otherwise responsive records under the rationale that such portions are not responsive to the FOIA request – compelling the disclosure of the entire record unless a specific FOIA exemption applies. Thus, the rule appears to authorize exactly what the D.C. Circuit's holding prohibits.

Finally, the EPA's decision to proceed with a final rule without providing any opportunity for public comment only further frustrates what should have been a transparent and publicly accountable dialogue. The EPA claims the rule change qualifies for the "good cause" exception to the public comment requirements of the Administrative Procedure Act (APA) in part because its revisions are "insignificant in impact and inconsequential to the public." [9] It is difficult to understand, however, how a rule that limits where requests may be made and appears to affirm political appointees' authority to redact information in ways that may violate binding precedent is "insignificant" or "inconsequential."

Given the potentially serious issues we have identified above, we urge you to reconsider your implementation of—or provide sufficient opportunity for public comment on—the "FOIA Regulations Update" final rule. At minimum, we urge you to at least provide additional transition time to ensure that the public and requesters are fully aware of the nature and impact of these policy changes. Thank you for your attention to this critical issue.

Sincerely,

PATRICK LEAHY
GRASSLEY

United States Senate
Senate

CHARLES E.

United States

DIANNE FEINSTEIN
CORNBYN

United States Senate
Senate

JOHN

United States

Natalie Yezbick

Press Secretary

Senator John Cornyn (R-TX)

From: Miranda Green <mgreen@thehill.com>

Sent: Monday, July 22, 2019 11:29 AM

To: Yezbick, Natalie (Cornyn) <Natalie_Yezbick@cornyn.senate.gov>

Subject: Re: Cornyn actions on EPA FOIA rule?

Hi Natalie,

Hope you had a nice weekend.

I wanted to follow up with you and see if you have any more details on a the letter or other measures the Senator might be pursuing on this?

Thanks,
Miranda

On Thu, Jun 27, 2019 at 5:21 PM Miranda Green <mgreen@thehill.com> wrote:

Thanks Natalie,

As the person who broke the story, you can imagine I'm interested to see what happens. Appreciate you keeping me in the loop!

Best,

Miranda

Miranda Green

Ex. 6 Personal Privacy (PP)

Mgreen@thehill.com

@mirandacgreen

On Jun 27, 2019, at 5:08 PM, Yezbick, Natalie (Cornyn)
<Natalie_Yezbick@cornyn.senate.gov> wrote:

Hey Miranda,

I'll be in touch if we have anything to announce on this. Off the record: There's talk of a letter but it's preliminary. I'll keep you updated.

Best,

Natalie Yezbick

Deputy Press Secretary

Senator John Cornyn (R-TX)

From: Miranda Green [<mailto:mgreen@thehill.com>]

Sent: Thursday, June 27, 2019 4:57 PM

To: Yezbick, Natalie (Cornyn) <Natalie_Yezbick@cornyn.senate.gov>

Subject: Cornyn actions on EPA FOIA rule?

Hi Natalie,

I saw Sen. Cornyn's comments about EPA and Interior's FOIA rule changes that FOIA lawyers say will make it easier for political appointees to withhold public documents.

I wanted to speak to you on background or OTR about whether the Senator is planning any reaction, by way of a letter, investigation request or bill?

Thanks,

Miranda

--

Miranda Green

Energy and Environment Reporter, The Hill

Ex. 6 Personal Privacy (PP)

mgreen@thehill.com

@mirandacgreen

--

Miranda Green

Energy and Environment Reporter, The Hill

Ex. 6 Personal Privacy (PP)

mgreen@thehill.com

[@mirandacgreen](#)

[1] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30028 (June 26, 2019) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>).

[2] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30033 (June 26, 2019) (to be codified at 40 C.F.R. § 2.103(b)) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>).

[3] Environmental Protection Agency, Office of the Administrator, *Awareness Notification Process for Select Freedom of Information Act Releases* (Nov. 1, 2018) (online at <http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf>).

[4] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30030 (June 26, 2019) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>).

[5] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30030 (June 26, 2019) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>).

[6] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30033 (June 26, 2019) (to be codified at 40 C.F.R. § 2.103(b)) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>). (emphasis added)

[7] *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016).

[8] *Id.*

[9] Environmental Protection Agency, *Freedom of Information Act Regulations Update*, 84 Fed. Reg. 30029 (June 26, 2019) (online at <https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>).

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Miranda Green

Energy and Environment Reporter, The Hill

Ex. 6 Personal Privacy (PP)

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--

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Energy and Environment Reporter, The Hill

Ex. 6 Personal Privacy (PP)

mgreen@thehill.com

@mirandacgreen

Message

From: abboud.michael@epa.gov [abboud.michael@epa.gov]
Sent: 7/23/2019 11:07:28 AM
To: Bennett, Tate [Bennett.Tate@epa.gov]
Subject: Re: Bipartisan senators blast EPA FOIA rule

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jul 23, 2019, at 6:17 AM, Bennett, Tate <Bennett.Tate@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

Sen. Patrick Leahy (D-Vt.), who introduced the 2007 and 2009 updates, and Sen. John Cornyn (R-Texas), the lead sponsor on the 2016 law, were among the signatories on today's letter,

Begin forwarded message:

From: "POLITICO Pro" <politicoemail@politicopro.com>
Date: July 22, 2019 at 3:56:25 PM EDT
To: <bennett.tate@epa.gov>
Subject: **Bipartisan senators blast EPA FOIA rule**
Reply-To: "POLITICO subscriptions" <reply-fe911c717366007c7d-1162770_HTML-791699120-1376319-0@politicoemail.com>

By Alex Guillén

07/22/2019 03:54 PM EDT

Bipartisan leaders from the Senate Judiciary Committee today said they have "significant concerns" about a rule issued recently by EPA updating the agency's regulations for complying with the Freedom of Information Act and asked Administrator Andrew Wheeler to reconsider it.

"While we appreciate the agency's commitment to updating its regulations in response to recent FOIA amendments, the rule purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA," wrote Sens. Patrick Leahy (D-Vt.), Chuck Grassley (R-Iowa), Dianne Feinstein (D-Calif.) and John Cornyn (R-Texas).

The lawmakers complained that the rule appears to give political appointees power to decide what to withhold and release to the public instead of career FOIA experts. Although not barred under FOIA, political appointees' inclusion in the process "can add unnecessary delays to the review process, potentially violating FOIA's statutory deadlines," the senators wrote. Future administrations could be emboldened to delay or meddle in FOIA requests, they added.

EPA has pushed back on previous similar criticisms, saying in a [press release](#) that the rule "simply restated in a single place the political and career Agency officials who are authorized to issue determinations under the FOIA statute." EPA did not immediately return a request for comment on the letter today.

The senators also complained that funneling all requests first through headquarters "effectively sidelines" regional offices and that the rule wrongly empowers EPA to withhold non-responsive portions of records. The senators also complained that EPA wrote the rule without taking public comment.

"We urge you to reconsider your implementation of — or provide sufficient opportunity for public comment on — the 'FOIA Regulations Update' final rule," the senators wrote.

WHAT'S NEXT: The rule is slated to take effect on Friday.

To view online:

<https://subscriber.politicopro.com/energy/whiteboard/2019/07/bipartisan-senators-blast-epa-foia-rule-3617148>

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This email was sent to bennett.tate@epa.gov by: POLITICO, LLC 1000 Wilson Blvd. Arlington, VA, 22209, USA

Message

From: Abboud, Merriam [abboud.merriam@epa.gov]
Sent: 6/25/2019 2:18:48 PM
To: AO OPA Individual News Clips [AO_OPA_Ind_News_Clips@epa.gov]
Subject: The Hill: New EPA rule would expand Trump officials' powers to reject FOIA requests

The Hill

New EPA rule would expand Trump officials' powers to reject FOIA requests

<https://thehill.com/policy/energy-environment/450169-new-epa-rule-would-expand-trump-officials-power-to-reject-foia-requests>

Miranda Green

Political appointees at the Environmental Protection Agency (EPA) will soon have the authority to reject public information requests without explanation.

The EPA's new Freedom of Information Act (FOIA) rule will expand the ability of the agency's administrator and other administration officials to withhold sought-after documents by labeling them "non-responsive," according to a copy of the final rule obtained by The Hill.

The rule is expected to be published in the Federal Register as early as Wednesday and will not allow for a public comment period.

According to the new language in the FOIA rule signed by EPA chief Andrew Wheeler last week, the administrator and other officials would be allowed to review all materials that fit a FOIA request criteria, known as responsive documents, and then decide "whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses."

EPA officials who would be authorized to make that decision include the administrator, deputy administrators, assistant administrators, deputy assistant administrators, regional administrators, deputy regional administrators, general counsel, deputy general counsels, regional counsels, deputy regional counsels and the inspector general or delegates of those individuals, according to the final rule.

A "no records" response would allow records seekers to be told there are no documents meeting their search criteria, even if they were found but withheld by the political appointees.

The blanket explanation for non-responsive materials may also make it harder for groups or individuals to legally challenge any of EPA's decisions to withhold documents, because it will be more difficult to prove they were withheld unlawfully. A person appealing their FOIA response would not know if any documents were withheld under a "no records" response.

"It's exceptionally difficult to litigate on the 'basis of responsiveness.' There is no record," said Kevin Bell, staff counsel at Public Employees for Environmental Responsibility.

"FOIA litigation is always pretty one-sided, there is no discovery...now they are just saying, 'Oh, it's not responsive. Oh, we don't have to tell you.'"

He added: "Discovery is almost never granted in those situations. Short of being an administrator or an EPA employee, there's no opportunity for oversight."

Bell equated EPA's new FOIA rule to a similar regulatory action unveiled earlier this year at the Interior Department, called an "awareness review," which allows political appointees 72 hours to review documents that mention them by name prior to release.

"It seems like EPA is doing about the same thing," he said. "On the 'basis of responsiveness' and 'no records responses' are both things that we've seen in the environmental FOIA community time and again," he said.

EPA officials characterize the rule change as a much-needed update to regulations as stipulated by 2007, 2009 and 2016 congressional updates to FOIA processing. The Obama administration failed to change its FOIA regulations as charged by Congress, and the new rule brings EPA into compliance.

"The changes in today's rule bring EPA's regulations into compliance with

non-discretionary provisions of the amended statute and reflect changes in the agency's organization, procedure, or practice," a senior career EPA official who helped devise the regulation told The Hill.

The official said the change to the "final determinations" authority in EPA's new rule largely combined two previous FOIA rules, and argued it wasn't a hefty change.

"This provision is not intended to be broader than the old regulations, which covered the subject in several provisions," the official said.

"The old regulations state that 'the head of an office, or that individual's designee, is authorized to grant or deny any request for a record of that office or other agency records when appropriate.' All positions listed in the updated regulations fall within the ordinary meaning of 'the head of an office, or that individual's designee.'" the official added.

While the EPA administrator and other political appointees have had the ability to grant or deny FOIA requests, doing so under the "basis of responsiveness" and "no response" option is a new addition in the forthcoming rule.

Other major changes in the rule include a decision to no longer allow EPA regional offices to handle initial FOIA requests. All requests instead must first be sent to the agency's National FOIA Office, which will then delegate the requests to the proper office.

Any requests sent first to regional offices by members of the press, the public or any organizations will not be redirected and won't be considered received.

"EPA expects to improve the efficiency and consistency of its intake and assignment processing, including more consistent and earlier outreach to requesters, through centralizing these functions into one office at the Agency," according to a statement provided by EPA on the rule change.

The agency official described the change as a way to align regional office FOIA responses with the national office.

"We took a look across the agency and saw there were different practices as to how they reached out to requesters in the first instance after a request has come in. We saw an opportunity to create greater uniformity. One of the practices we'll be adopting as this goes into effect is reaching out consistently to FOIA requesters with an initial letter," the official said.

Bell warned that the new order could allow EPA political appointees to better control the documents ultimately released by regional offices. He said regional offices often have less political pressure to withhold more responsive materials.

"This is just making sure that every FOIA request that gets reviewed gets taken down the hall or next door to Andrew Wheeler's office," Bell said. "Basically, anytime a FOIA request goes up to the administration you can extend however long it will take and reduce what you get back."

The EPA official argued the changes would neither speed up nor slow down the FOIA process. Under President Trump, the agency has experienced a huge uptick in FOIA requests and major backlog in processing, which has been exacerbated in some instances by a lack of funding to hire new staff to help with those requests.

"I don't think this will change the speed or response at all. We're trying to be consistent with outreach to requesters and not anticipating this will slow down our response," the senior official said. "Our aspiration is to come into compliance with the statute, in the most straight and most direct way possible, without coming into any discretionary changes with the statute."

The EPA has come under criticism for its handling of FOIA requests under Trump's presidency. Last fall, agency heads clashed with top Democratic lawmakers over an admittance by then acting EPA Administrator Wheeler's chief of staff to investigators with the House Oversight and Reform Committee that certain FOIA requests were put under more intense scrutiny because they were "politically charged."

Rep. Elijah Cummings (Md), who at the time was the panel's top Democrat and is now chairman, accused the EPA of impeding requests.

In a letter to lawmakers at the time, Kevin Minoli, the EPA's principal deputy general counsel, defended the EPA's decision to notify senior officials throughout the FOIA process regarding high-profile requests, what was being called at EPA an awareness review.

"This 'awareness review' process does not itself violate FOIA and can be completed without causing undue delay," Minoli said.

In another instance, former EPA staffers under previous administrator Scott Pruitt told congressional investigators in June 2018 that Pruitt had directed staff to finish completing FOIA requests submitted under former President Obama before starting on those requesting information from his tenure.

Message

From: Epp, Timothy [Epp.Timothy@epa.gov]
Sent: 6/25/2019 8:10:28 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: RE: CNN INQUIRY

Ex. 5 Deliberative Process (DP)

Tim

Timothy R. Epp
|National FOIA Office
U.S. Environmental Protection Agency | Office of General Counsel
1200 Pennsylvania Avenue, N.W. (MC 2310A)
Washington, D.C. 20460 | WJCN 7309B
Phone (202) 564-2830 | epp.timothy@epa.gov

-----Original Message-----

From: Abboud, Michael
Sent: Tuesday, June 25, 2019 4:02 PM
To: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Epp, Timothy <Epp.Timothy@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>
Subject: FW: CNN INQUIRY

Ex. 5 Deliberative Process (DP)

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 4:00 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: RE: CNN INQUIRY

One more question

Can I get this part of what you said earlier on the record or at least on background if possible --

EPA appealed to OMB to use the good cause amendment in this rule's case in order to skip the proposed rule and comment period normally required when changing federal rules. OMB said that EPA met the good cause amendment requirements in the APA and allowed them to bypass this part of the normal federal rulemaking process, which is why the rule is being released as a final rule.
(this is just me paraphrasing what you said, feel free to change if I am not representing this accurately)

-----Original Message-----

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, June 25, 2019 3:55 PM
To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Cc: Press <Press@epa.gov>
Subject: RE: CNN INQUIRY

Yeah here you are, give me a call if you have any questions. Also see our press release from earlier today for more information: https://urldefense.proofpoint.com/v2/url?u=https-3A__www.epa.gov_newsreleases_hill-2Dgets-2Ddit-2Dwrong-2Dnew-2Ddepa-2Dfoia-2Dregulation&d=DwIGaQ&c=W8uiIUYdLnv14aAum30ieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsCiz4DkVTH00&m=ionJFXHZLk_g6G8aM_a-kAB78ixLgnEckA6TjAx67GLE&s=3QFZQGWHYZUFCBjq9rpiSmkM8LSRYjCVIZUs2yLLwoQ&e=

"The Agency has determined that the changes in this Rulemaking qualify for either the good cause or procedural exceptions to the Administrative Procedure Act's notice and comment requirements. The changes

in the Rulemaking bring EPA's regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the Agency's internal organization, procedure, or practice." - EPA spokesman

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 3:04 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Cc: Press <Press@epa.gov>
Subject: RE: CNN INQUIRY

We are planning to publish this afternoon. If you could get us something in the next hour or two that would be great. Thanks!

-----Original Message-----

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, June 25, 2019 3:03 PM
To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Cc: Press <Press@epa.gov>
Subject: Re: CNN INQUIRY

Give me a few minutes and I'll have it over. When's your deadline?

Sent from my iPhone

> On Jun 25, 2019, at 3:00 PM, Kaufman, Ellie <Ellie.Kaufman@turner.com> wrote:

>

> Michael,

>

> Is this the final rule that goes into effect tomorrow?

> https://urldefense.proofpoint.com/v2/url?u=https-3A__s3.amazonaws.com_public-2Dinspection.federalregister.gov_2019-2D13290.pdf-3Futm-5Fmedium-3Demail-26utm-5Fcampaign-3Dpi-2Bsubscription-2Bmailing-2Blist-26utm-5Fsource-3Dfederalregister.gov&d=DwIGaQ&c=W8uiIUYdLnv14aAum3Oieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsciz4DkVTH00&m=1nHacDHqS-MB6KNFYCjtEsn9UupkcgmvCG59Uq2joTU&s=GazHNoZLLV_hcjd94U41qfa6ervTkxzHISBKh9P2MLM&e=

>

> It's already published in the federal register, I believe.

>

> Also, can you tell me again what the APA clause you mentioned on the phone was that you said you all used to not have a proposed rule/public comment period for this rule?

>

> If you have an on the record statement about this, please share it with me. We are going to file on this.

>

> Thanks,

> Ellie

>

> -----Original Message-----

> From: Kaufman, Ellie

> Sent: Tuesday, June 25, 2019 12:44 PM

> To: press@epa.gov

> Subject: CNN INQUIRY

>

> Hello,

>

> I see that a final rule regarding the FOIA process is going into effect tomorrow. Can you tell me more about this rule? Why is EPA updating the FOIA rule? What are the major changes?

>

> Thanks!

>

> Ellie Kaufman

> CNN Washington

> Ex. 6 Personal Privacy (PP)

>

> Sent from iPhone

Message

From: Tran, Victoria [tran.victoria@epa.gov]
Sent: 7/25/2019 2:58:00 PM
To: Willey, Katharine [willey.katharine@epa.gov]
CC: Abboud, Michael [abboud.michael@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]
Subject: RE: FOIA Regulation Fact Sheet

Great!

From: Willey, Katharine
Sent: Thursday, July 25, 2019 10:56 AM
To: Tran, Victoria <tran.victoria@epa.gov>
Cc: Abboud, Michael <abboud.michael@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Voyles, Travis <Voyles.Travis@epa.gov>
Subject: Re: FOIA Regulation Fact Sheet

Ex. 5 Deliberative Process (DP)

On Jul 25, 2019, at 10:54 AM, Tran, Victoria <tran.victoria@epa.gov> wrote:

Just in case.

VT

<EPA NFO Factsheet FOIA Regulation Update 07252019.pdf>

Message

From: Tran, Victoria [tran.victoria@epa.gov]
Sent: 7/25/2019 2:54:58 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]
Subject: FOIA Regulation Fact Sheet
Attachments: EPA NFO Factsheet FOIA Regulation Update 07252019.pdf

Just in case.

VT



National FOIA Office
EPA Office of General Counsel

NATIONAL FOIA OFFICE

Timothy Epp
National FOIA Office
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Epp.tim@epa.gov

Larry Gottesman
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Gottesman.larry@epa.gov

Denise Walker
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Walker.denise@epa.gov

Visit our ***new*** [SHAREPOINT SITE](#)

REGULATION CONTACT

Christopher Creech
202-564-4286
creech.christopher@epa.gov

CENTRALIZATION CONTACTS

Kevin W. Hill
202-564-1652
Hill.kevinw@epa.gov

Wendy Schumacher
202-566-2513
Schumacher.wendy@epa.gov

FEEDBACK

Please direct feedback to:
OGCNFOSuggestions@epa.gov

MEDIA

Any Media inquiries should be
directed to:
press@epa.gov

NATIONAL FOIA OFFICE FACTSHEET

Issue date: July 25, 2019

UPDATED FOIA REGULATIONS

Overall

- EPA's updated [FOIA regulations](#) will be effective on July 26, 2019.
- This regulatory amendment does not replace or diminish Ryan Jackson's November 16, 2018 Memorandum on Awareness Notification.
- Certain revisions in this action update the EPA's rules to accurately reflect the Agency's organizational structure and implement statutorily directed changes.
 1. EPA is updating its FOIA regulations to conform with changes mandated by the amendments to the FOIA statute in 2007, 2009, and 2016.
 2. The 2016 Amendments provide that "each agency ... shall review the regulations of such agency and shall issue regulations in accordance with the [2016 Amendments]." 130 Stat. 544 § 3.
 3. The National FOIA Office recommended the changes to update EPA's regulations to comply with nondiscretionary changes in the statute over the past 10 years and to centralize the intake process in the NFO to increase our efficiency, effectiveness, and consistency in early outreach to requesters.

Centralization

- All FOIA requests submitted after July 26, 2019 will be directed to EPA Headquarters by US Mail or FOIAonline.
- Regional and program offices will still conduct search, collection, review, and record releases once the National FOIA Office has assigned a request to a region or program office.
- Centralizing FOIA intake was one of the key process improvement ideas that emerged from a Lean Management Kaizen event in early 2018.
- In 2018, the FOIA Federal Advisory Committee, convened by the National Archives, recommended that federal departments and agencies "centralize FOIA processing where appropriate." Centralized FOIA submission will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

One Month Glidepath

- To assist with the transition, EPA is voluntarily instructing Regions who receive improperly submitted mailed or emailed requests directly from requesters to continue accepting those requests until August 23, 2019. For requests improperly submitted after August 23, 2019, the Agency has also instructed Regions to inform requesters of the proper methods for submitting FOIA requests under the updated FOIA regulation.

Message

From: Voyles, Travis [Voyles.Travis@epa.gov]
Sent: 7/10/2019 12:13:14 AM
To: Rodrick, Christian [rodrick.christian@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Frye, Tony (Robert) [frye.robert@epa.gov]; Abboud, Michael [abboud.michael@epa.gov]
Subject: Re: EPA FOIA Rule APA Concerns

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jul 9, 2019, at 5:35 PM, Rodrick, Christian <rodrick.christian@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

Christian Rodrick
(202) 564-4828

From: Brazauskas, Joseph
Sent: Tuesday, July 9, 2019 5:08 PM
To: Voyles, Travis <Voyles.Travis@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Cc: Abboud, Michael <abboud.michael@epa.gov>
Subject: FW: EPA FOIA Rule APA Concerns

FYI

Joseph A. Brazauskas
Acting Associate Administrator
Office of Congressional & Intergovernmental Relations
U.S. Environmental Protection Agency
(202) 564-5189

From: Seigel, Jessica <Jessica.Seigel@mail.house.gov>
Sent: Tuesday, July 9, 2019 5:06 PM
To: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>
Subject: EPA FOIA Rule APA Concerns

Hi all,

Please see the attached letter. Rep. Porter looks forward to Administrator Wheeler's reply regarding this important issue.

Do not hesitate reach out with any questions you may have.

Best,

Jessica

Jessica Seigel

Legislative Assistant

Congresswoman Katie Porter (CA-45)

1117 Longworth House Office Building

Washington, D.C. 20515

Jessica.Seigel@mail.house.gov

Message

From: Jackson, Ryan [jackson.ryan@epa.gov]
Sent: 7/22/2019 7:54:13 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]
CC: Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]; Frye, Tony (Robert) [frye.robert@epa.gov]
Subject: RE: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Monday, July 22, 2019 3:53 PM
To: Willey, Katharine <willey.katharine@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: Re: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jul 22, 2019, at 3:38 PM, Willey, Katharine <willey.katharine@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

On Jul 22, 2019, at 3:35 PM, Jackson, Ryan <jackson.ryan@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Monday, July 22, 2019 3:25 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: FW: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Alex Guillen <aguillen@politico.com>

Sent: Monday, July 22, 2019 3:22 PM

To: Press <Press@epa.gov>

Subject: Comment on senators' FOIA letter?

Hello,

I'm writing a Whiteboard item on today's letter to EPA from a bipartisan group of senators regarding EPA's recent FOIA regulation update. The rule "purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA," they wrote. Does EPA have a response to the senators?

Thanks,

Alex Guillen | Energy Reporter | POLITICO PRO
1000 Wilson Boulevard, 8th Floor | Arlington, VA 22209

Phone: Ex. 6 Personal Privacy (PP)

Email: aguillen@politico.com | Twitter: [@alexaguillen](https://twitter.com/alexaguillen) | Website: www.POLITICOPro.com

Message

From: Abboud, Merriam [abboud.merriam@epa.gov]
Sent: 6/26/2019 1:24:56 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: What I can see

<https://www.commondreams.org/news/2019/06/25/emulating-cia-new-rule-would-let-trumps-epa-disregard-foia-requests-near-impunity>
<http://blogs.edf.org/health/2019/06/25/edf-files-comments-on-two-epa-proposals-affecting-epas-and-the-publics-access-to-chemical-information-under-tsca/>

Same article by CNN, "EPA Changes Transparency Rules":

<https://www.cnn.com/2019/06/26/politics/epa-foia-rule/>
<https://www.wral.com/epa-changes-transparency-rules/18474785/>
<https://kbzk.com/cnn-us-politics/2019/06/26/epa-changes-transparency-rules/>
<http://www.wicz.com/story/40709867/epa-changes-transparency-rules>
<https://kpax.com/cnn-us-politics/2019/06/26/epa-changes-transparency-rules/>

Message

From: Brazauskas, Joseph [brazauskas.joseph@epa.gov]
Sent: 7/9/2019 9:08:23 PM
To: Voyles, Travis [Voyles.Travis@epa.gov]; Rodrick, Christian [rodrick.christian@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Frye, Tony (Robert) [frye.robert@epa.gov]
CC: Abboud, Michael [abboud.michael@epa.gov]
Subject: FW: EPA FOIA Rule APA Concerns
Attachments: EPAFOIALetterFinal.pdf

FYI

Joseph A. Brazauskas

Acting Associate Administrator
Office of Congressional & Intergovernmental Relations
U.S. Environmental Protection Agency
(202) 564-5189

From: Seigel, Jessica <Jessica.Seigel@mail.house.gov>
Sent: Tuesday, July 9, 2019 5:06 PM
To: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Richardson, RobinH <Richardson.RobinH@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>; Rodrick, Christian <rodrick.christian@epa.gov>
Subject: EPA FOIA Rule APA Concerns

Hi all,

Please see the attached letter. Rep. Porter looks forward to Administrator Wheeler's reply regarding this important issue.

Do not hesitate reach out with any questions you may have.

Best,
Jessica

Jessica Seigel

Legislative Assistant
Congresswoman Katie Porter (CA-45)
1117 Longworth House Office Building
Washington, D.C. 20515
Jessica.Seigel@mail.house.gov

KATIE PORTER
45TH DISTRICT, CALIFORNIA

FINANCIAL SERVICES COMMITTEE
SUBCOMMITTEE ON
INVESTOR PROTECTION, ENTREPRENEURSHIP, AND
CAPITAL MARKETS
SUBCOMMITTEE ON
CONSUMER PROTECTION AND FINANCIAL SERVICES

Congress of the United States
House of Representatives
Washington, DC 20515-0345

WASHINGTON OFFICE
1117 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-8811

DISTRICT OFFICE
2151 MICHELSON DRIVE
SUITE #105
IRVING, CA 92612
(949) 865-8800
porter.house.gov

July 9, 2019

Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20004

Dear Administrator Wheeler,

I am writing with concerns regarding the recently released final rule to revise the Environmental Protection Agency's (EPA) regulations under the Freedom of Information Act (FOIA) pursuant to the FOIA Improvement Act of 2016 (2016 FOIA Amendments).¹

Government transparency is central to our democracy. At a time when climate change threatens our communities, public access to the government's work to address this crisis is essential. The purpose of FOIA requests is to provide the public with information regarding government actions and decision making. The rule, as published by EPA, will make the public process for accessing information more opaque. It is particularly concerning that the EPA chose to write this rule without public input.

In the rule, the agency states that the EPA is using the Good Cause and Procedural Exceptions under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(A), to issue a final rule without providing notice or an opportunity for public comment. I believe that the argument provided in the final rule to utilize the good cause exception is without merit, and therefore request that the EPA rescind the final rule and instead follow the appropriate rulemaking process. Before choosing to substantially and formally change the FOIA process at EPA, members of the public should be afforded the opportunity to weigh in with the agency regarding this proposal.

The APA establishes a formal process by which federal agencies are required to make rules. The law allows for exceptions in the case of what is known as "good cause."² The good cause exception allows for an agency to circumvent the typical rulemaking process if the agency believes that public notice and comment procedures are "impracticable, unnecessary,

¹ <https://www.congress.gov/114/plaws/publ185/PLAW-114publ185.pdf>

² <https://www.justice.gov/sites/default/files/jmd/legacy/2014/05/01/act-pl79-404.pdf>

or contrary to the public interest.”³ This enables an agency to issue a rule without providing prior notice or an opportunity for public comment and review.

Good cause exceptions are often limited to “emergencies; contexts where prior notice would subvert the underlying statutory scheme; and situations where Congress intends to waive Section 553’s requirements.”⁴ Contexts where the agency believes that public comment would strongly oppose the rule is not considered an eligible good cause exception.

In the final rule, the agency writes that the EPA has determined that there is good cause to revise its FOIA regulations because “the agency lacks discretion to reach a different outcome in response to comment.”⁵ I fail to see how the reason, as written and justified in the final rule, qualifies as a good cause that is “impracticable, unnecessary, or contrary to the public interest,” and I believe that this interpretation violates the intent of Congress as well as the precedent set by other agencies as they’ve come into compliance with the 2016 FOIA Amendments. In fact, no other federal agency has claimed good cause for circumnavigating APA while coming into compliance with the 2016 FOIA Amendments. The Department of Treasury, National Aeronautics and Space Administration, the Food and Drug Administration, and the Securities and Exchange Commission have all followed the regular rule making process in updating their respective FOIA policies.⁶

The assertion that “these regulatory revisions are insignificant in impact and inconsequential to the public” seems to try to classify the rule as “unnecessary” under the “good cause” exception, but the EPA rule goes beyond the narrow requirements directed by Congress in the 2016 FOIA Amendments.⁷ For example, the rule requires that all FOIA requests are directed through the central office, which is not statutorily required. The use of the good cause exemption is therefore inappropriate, given that such an exemption is only available in instances where a change was specifically directed in law. Moreover, this change is both significant and consequential to the public, given that the new process would likely significantly delay FOIA requests as the EPA is not set up to oversee centralized processing. I believe that these regulatory revisions are significant in impact and consequential to public access to important and necessary information.

While I understand the agency’s desire to update it’s 2002 regulations, I have strong concerns with the process in which it was done. With this in mind, I request that EPA revisit the rule and follow the appropriate process established under the Administrative Procedure Act to issue a request for information, a proposed rule for comments, and eventually, a

³ [http://uscode.house.gov/view.xhtml?req=\(title:5%20section:553%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:5%20section:553%20edition:prelim))

⁴ <https://fas.org/sgp/crs/misc/R44356.pdf>

⁵ <https://federalregister.gov/d/2019-13290>

⁶ <https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1505-AC35>,
<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2700-AE47>,
<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=0910-AH69>,
<https://reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=3235-AM25>

⁷ <https://federalregister.gov/d/2019-13290>

revised final rule. Additionally, I ask that you provide all legal memoranda provided to the Administrator's office that was used to support the publication of this rule outside of the APA process. Finally, I ask that you provide any other examples of which the agency is aware where other agencies circumvented the APA in updating their FOIA policies to reflect the 2016 change in law.

Please do not hesitate to reach out to Jessica Seigel on my staff at 202-225-5611 if you have any questions or concerns.

Sincerely,

A handwritten signature in dark ink, reading "Katie Porter". The signature is fluid and cursive, with the first name "Katie" and last name "Porter" clearly distinguishable.

Katie Porter
Member of Congress

Message

From: Kelsey Tamborrino [ktamborrino@politico.com]
Sent: 6/27/2019 8:46:05 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: Re: EPA's Response to Society of Environmental Journalists

Thanks, Michael!

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Thursday, June 27, 2019 4:45:25 PM
To: Kelsey Tamborrino
Subject: Fwd: EPA's Response to Society of Environmental Journalists

Kelsey want to flag for morning energy.

Sent from my iPhone

Begin forwarded message:

From: "EPA Press Office" <press@epa.gov>
Date: June 27, 2019 at 3:55:49 PM EDT
To: "abboud.michael@epa.gov" <abboud.michael@epa.gov>
Subject: EPA's Response to Society of Environmental Journalists
Reply-To: press@epa.gov

EPA's Response to Society of Environmental Journalists

.....

This week several media outlets misrepresented EPA's new FOIA regulation, and were forced to correct their misreporting. This new regulation brings the Agency into compliance with the Congressional amendments to FOIA from 2007, 2009, and 2016. Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations. The Obama administration failed to meet this deadline.

Yesterday, the Society of Environmental Journalists (SEJ), whose mission states that they strive to "strengthen the quality" of environmental journalism, sent a letter to EPA Administrator Andrew Wheeler which included numerous inaccuracies that were regurgitated from false articles. Below is EPA's response to the SEJ, signed by EPA career officials.

BELOW IS THE LETTER IN FULL:

Dear Director Parker:

On behalf of the Administrator of the U.S. Environmental Protection Agency, we write in response to your letter dated, June 26, 2019. Together we manage the Agency's National Freedom of Information Act Office, which advises the Agency on legal issues pertaining to FOIA requests, coordination, and project management. Additionally, we are the two career attorneys tasked with providing the recommendations to update the Agency's FOIA regulations.

This week EPA finalized an updated FOIA regulation that brings the Agency into compliance with a series of Congressional amendments. Unfortunately, a series of false and misleading claims have relayed inaccurate information to the public about this updated regulation. The Agency believes it is important to address these significant misrepresentations and emphasize that the update to the Agency's FOIA regulation in no way expands or increases the authority of political officials in the FOIA process. The Agency's updated regulation does not grant political officials' additional authority to review or withhold FOIA documents, their authority will remain consistent with the authority granted to them under the past regulation.

1. EPA did not expand political officials' oversight of FOIA responses.

EPA's updated FOIA regulation did not change the political officials with FOIA decisionmaking authority or expand their authority.

In fact, the FOIA decisionmakers identified in EPA's updated regulation are nearly identical to the list in EPA's old regulations at 40 CFR 2.104(h).

EPA's updated regulation now expressly lists the Administrator, who always had full FOIA decisionmaking authority under the statute, itself. The updated regulations have not increased or otherwise altered the Administrator's authority to make decisions under FOIA.

EPA's updated regulation also expressly lists the Deputies in Program and Regional Offices. These officials always had FOIA decisionmaking authority under the regulations as "designees." Deputies most frequently include the top career official in each program and regional office. Rather than expanding political officials' oversight - which this language did not do -- this change expressly recognizes the role of career officials.

In fact, FOIA responses are rarely, issued by political employees -- to the contrary, such decisions typically are issued at the career director or career branch chief level. The updated regulation is not expected to impact or alter that practice.

2. EPA did not expand political officials' power.

EPA's updated regulation did not and cannot change the statute Congress passed.

FOIA determinations have always included decisions to withhold records or to issue "no records" responses. The updated regulation does not grant more power than EPA's prior regulations.

EPA's prior rules provided in section 104(g) that "[a]n adverse determination consists of . . . a determination that a requested record does not exist or cannot be located[.]" EPA's new updated regulation does not state anything more than this.

3. EPA's decision to centralize the intake process will speed FOIA processing, not slow it.

EPA's decision to streamline submission of FOIA requests to its National FOIA Office will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

In 2018, the FOIA Federal Advisory Committee, convened by the National Archives, recommended that federal departments and agencies "centralize FOIA processing where appropriate." Centralized FOIA submission will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

Many other departments and agencies have gone further than EPA in streamlining the FOIA processing, such as Department of State, USAID, Social Security Administration (in the Office of General Counsel), the Securities and Exchange Commission, and Commodity Futures Trading Commission (in the Office of General Counsel), among others. EPA has left the FOIA response decisionmaking authority with the offices that are document custodians. Department of Labor has a similar centralized FOIA submission mailbox and decentralized FOIA processing and response structure.

Centralized FOIA intake and initial review will allow EPA to minimize coordination required for initial assignment of FOIA requests and to ensure consistency in early outreach to requesters.

4. EPA's decision to publish a final rule does not violate Administrative law

EPA's decision to increase efficiency by providing a single location for the public to submit FOIA requests is a procedural rule that does not require notice and comment under the Administrative Procedure Act.

EPA also published its FOIA updated regulation as a final rule without notice and public comment because EPA had no discretion for the changes mandated by the amendments to FOIA in 2007, 2009, and 2016.

Many other agencies similarly published final rules to implement these amendments without notice and comment. Those include:

- Housing and Urban Development. 82 FR 3619 (01/12/2017)
- NEH, National Foundation on the Arts and the Humanities, 82 FR 44 (01/03/2017)
- U.S. Nuclear Regulatory Commission, 81 FR 96344 (12/30/2016)
- Department of Energy, 81 FR 94915 (12/27/2016)
- U.S. International Trade Commission, 81 FR 86575 (12/01/2016)
- Farm Credit Administration, 81 FR 63365 (09/15/2019)
- Surface Transportation Board, 81 FR 90750 (12/15/2019)
- Office of Special Counsel, 82 FR 15609 (03/30/2017)
- National Labor Relations Board, 82 FR 11748 (02/24/2017)
- National Council on Disability, 81 FR 93791 (12/22/2016)
- Tennessee Valley Authority, 82 FR 41511 (09/01/2017)
- Defense Nuclear Facilities Safety Board, 82 FR 30722 (07/03/2017)

5. EPA regions are still empowered to grant requests

Under the updated regulation regional offices have the authority to grant FOIA requests.

The updated regulation only centralizes the intake of FOIA requests to the National FOIA Office; it does not centralize the searching, reviewing, or production of records.

The updated regulation, like the 2002 regulations, continues to provide regional administrators, their deputies, and delegates the authority to issue final determinations.

Best Regards,

Elise Packard, Acting Deputy General Counsel for Operations

Timothy Epp, Acting Director, National EPA FOIA Office

<!--[if !mso]-->[Visit The EPA's Newsroom](#)<!--[endif]-->



U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004



[Unsubscribe](#)

Message

From: Brazauskas, Joseph [brazauskas.joseph@epa.gov]
Sent: 7/22/2019 7:52:01 PM
To: Leopold, Matt (OGC) [Leopold.Matt@epa.gov]
CC: Willey, Katharine [willey.katharine@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Abboud, Michael [abboud.michael@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]; Frye, Tony (Robert) [frye.robert@epa.gov]
Subject: Re: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Jul 22, 2019, at 3:32 PM, Leopold, Matt (OGC) <Leopold.Matt@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

From: Willey, Katharine
Sent: Monday, July 22, 2019 3:30 PM
To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: RE: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Schiermeyer, Corry
Sent: Monday, July 22, 2019 3:26 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: RE: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Monday, July 22, 2019 3:25 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Frye, Tony (Robert) <frye.robert@epa.gov>
Subject: FW: Comment on senators' FOIA letter?

Ex. 5 Deliberative Process (DP)

From: Alex Guillen <aguillen@politico.com>
Sent: Monday, July 22, 2019 3:22 PM
To: Press <Press@epa.gov>
Subject: Comment on senators' FOIA letter?

Hello,

I'm writing a Whiteboard item on today's [letter](#) to EPA from a bipartisan group of senators regarding EPA's recent FOIA regulation update. The rule "purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA," they wrote. Does EPA have a response to the senators?

Thanks,

Alex Guillen | Energy Reporter | POLITICOPro
1000 Wilson Boulevard, 8th Floor | Arlington, VA 22209
Phone: Ex. 6 Personal Privacy (PP)
Email: aguillen@politico.com | Twitter: [@alexaguillen](https://twitter.com/alexaguillen) | Website: www.POLITICOPro.com

Message

From: Konkus, John [konkus.john@epa.gov]
Sent: 6/27/2019 5:54:40 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]
CC: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: RE: EPA's Response to Society of Environmental Journalists Letter - Preview

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Thursday, June 27, 2019 1:41 PM
To: Jackson, Ryan <jackson.ryan@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>
Cc: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Konkus, John <konkus.john@epa.gov>
Subject: FW: EPA's Response to Society of Environmental Journalists Letter - Preview

Below is the draft release

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: EPA Press Office <press@epa.gov>
Sent: Thursday, June 27, 2019 1:39 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: EPA's Response to Society of Environmental Journalists Letter - Preview

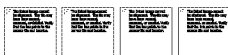
Ex. 5 Deliberative Process (DP)

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Ex. 5 Deliberative Process (DP)

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Message

From: Epp, Timothy [Epp.Timothy@epa.gov]
Sent: 6/25/2019 7:23:58 PM
To: Abboud, Michael [abboud.michael@epa.gov]
CC: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Konkus, John [konkus.john@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: Re: CNN INQUIRY

Clear by me.

Sent from my iPhone

> On Jun 25, 2019, at 3:10 PM, Abboud, Michael <abboud.michael@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

> -----Original Message-----

> From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
> Sent: Tuesday, June 25, 2019 3:04 PM
> To: Abboud, Michael <abboud.michael@epa.gov>
> Cc: Press <Press@epa.gov>
> Subject: RE: CNN INQUIRY

> We are planning to publish this afternoon. If you could get us something in the next hour or two that would be great. Thanks!

> -----Original Message-----

> From: Abboud, Michael <abboud.michael@epa.gov>
> Sent: Tuesday, June 25, 2019 3:03 PM
> To: Kaufman, Ellie <Ellie.Kaufman@turner.com>
> Cc: Press <Press@epa.gov>
> Subject: Re: CNN INQUIRY

> Give me a few minutes and I'll have it over. When's your deadline?

> Sent from my iPhone

>> On Jun 25, 2019, at 3:00 PM, Kaufman, Ellie <Ellie.Kaufman@turner.com> wrote:

>> Michael,

>> Is this the final rule that goes into effect tomorrow?

>> https://urldefense.proofpoint.com/v2/url?u=https-3A__s3.amazonaws.com_public-2Dinspection.federalregister.gov_2019-2D13290.pdf-3Futm-5Fmedium-3Demail-26utm-5Fcampaign-3Dpi-2Bsubscription-2Bmailing-2Blist-26utm-5Fsource-3Dfederalregister.gov&d=DwIGaQ&c=W8uiIUYdLnV14aAum3Oieg&r=4R1FAIGN61GAHSXJvzzG6uvzraJ_pCIsciz4DkVTH00&m=1nHacDHqS-MB6KNFYCjtEsn9UupkcgmvCG59Uq2joTU&s=GazHNoZLLV_hcjd94U41qfa6ervTkxzHISBKh9P2MLM&e=

>> It's already published in the federal register, I believe.

>> Also, can you tell me again what the APA clause you mentioned on the phone was that you said you all used to not have a proposed rule/public comment period for this rule?

>> If you have an on the record statement about this, please share it with me. We are going to file on this.

>> Thanks,
>> Ellie

>> -----Original Message-----

>> From: Kaufman, Ellie
>> Sent: Tuesday, June 25, 2019 12:44 PM
>> To: press@epa.gov
>> Subject: CNN INQUIRY

>>
>> Hello,
>>
>> I see that a final rule regarding the FOIA process is going into effect tomorrow. Can you tell me more about this rule? Why is EPA updating the FOIA rule? What are the major changes?
>>
>> Thanks!
>>
>> Ellie Kaufman
>> CNN Washington
>> Ex. 6 Personal Privacy (PP)
>>
>> Sent from iPhone

Message

From: Donahue, Sean [donahue.sean@epa.gov]
Sent: 7/24/2019 8:38:03 PM
To: Tran, Victoria [tran.victoria@epa.gov]; Abboud, Michael [abboud.michael@epa.gov]; White, Elizabeth [white.elizabeth@epa.gov]
CC: Beach, Christopher [beach.christopher@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]
Subject: RE: Questions from Washington Post about new FOIA rule

There are two sources for numbers on this, annual FOIA reports to Congress and FOIAonline. I would suggest using the information from FOIAonline (near the end of this email). The numbers reported to Congress by fiscal year are as follows.

Requests Received (Annual Reports)	
<i>Fiscal Year</i>	<i>Requests Received</i>
FY 2008	11,492
FY 2009	10,317
FY 2010	10,409
FY 2011	10,123
FY 2012	9,689
FY 2013	9,951
FY 2014	10,470
FY 2015	10,910
FY 2016	10,403
FY 2017	11,518
FY 2018	11,364

Please note that on June 25, 2010, EPA released the *MyProperty* tool (<https://enviro.epa.gov/facts/myproperty/>), which helped reduce the number of routine FOIA requests received by providing the public more readily available environmental information. (For background, see <https://blog.epa.gov/2010/08/30/my-property-info/>). I have heard this helped decrease the number of received requests, particularly in EPA regional offices.

Ex. 5 Deliberative Process (DP)

A breakdown of requests received by fiscal year (FY) and calendar year (CY) is below.

FOIAonline Numbers			
<i>Year (FY or CY)</i>	<i>EPA</i>	<i>HQ</i>	<i>AO</i>
FY 2013	9,890	1,929	141
FY 2014	10,425	1,887	106
FY 2015	10,857	1,925	215
FY 2016	10,356	2,127	203
FY 2017	11,494	3,592	1045
FY 2018	11,341	3,547	937
FY 2019 (so far)	7,212	3,654	413
CY 2013	9,733	1,928	142
CY 2014	10,958	1,955	139

CY 2015	10,522	1,906	201
CY 2016	10,362	2,159	243
CY 2017	11,946	4,001	1,201
CY 2018	10,951	3,793	847
CY 2019 (so far)	4,800	2,517	270
<i>*Information as of 4:00 PM EDT</i>			

Please reach out with any questions.

Best regards,

Sean M. Donahue

Special Advisor

Office of the Executive Secretariat

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW

Washington, DC 20460

O: (202) 564-5007

Donahue.Sean@epa.gov

From: Tran, Victoria

Sent: Wednesday, July 24, 2019 3:35 PM

To: Abboud, Michael <abboud.michael@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Donahue, Sean <donahue.sean@epa.gov>

Cc: Beach, Christopher <beach.christopher@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>

Subject: RE: Questions from Washington Post about new FOIA rule

Just to confirm, EPA's FOIA regulations were last updated in 2002. Since then the FOIA statute was amended in 2007, 2009, and 2016. There were multiple attempts from the previous Administration to renew the outdated regulation but no changes were implemented or made. The updated FOIA regulations, set forth by this Administration, aims to not only bring clarity but also intends to comply with the changes from the statute.

VT

From: Tran, Victoria

Sent: Wednesday, July 24, 2019 2:57 PM

To: Abboud, Michael <abboud.michael@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Donahue, Sean <donahue.sean@epa.gov>

Cc: Beach, Christopher <beach.christopher@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>

Subject: RE: Questions from Washington Post about new FOIA rule

Ex. 5 Deliberative Process (DP)

Also, the FOIA statute was amended in 2016. To comply with the newly amended statute, the Agency needed to update its regulation to not only ensure compliance but also gave specifics and clarity in its most recent version.

VT

From: Abboud, Michael

Sent: Wednesday, July 24, 2019 2:44 PM

To: Tran, Victoria <tran.victoria@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Donahue, Sean <donahue.sean@epa.gov>

Cc: Beach, Christopher <beach.christopher@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>

Subject: FW: Questions from Washington Post about new FOIA rule

We have answers on the other two, can you all help with the third question?

From: Grandoni, Dino <Dino.Grandoni@washpost.com>

Sent: Wednesday, July 24, 2019 2:27 PM

To: Press <Press@epa.gov>

Subject: Questions from Washington Post about new FOIA rule

Hi all,

Hope you're well. I'm writing in because I'm writing a story about EPA's (and Interior Department's) FOIA practices.

- 1) Does the EPA have a response to the lawsuit filed today by the Center for Biological Diversity and Environmental Integrity Project regarding the EPA's soon-to-be-finalized FOIA regulation?
- 2) Has Administrator Wheeler replied to the letter sent by Sens. Grassley, Leahy, Cornyn and Feinstein regarding the EPA rule?
- 3) Can you provide with updated figures on the number of FOIA requests during the Trump administration vs. Obama administration (in order to demonstrate for readers the uptick of requests the agency is dealing with)? Is that uptick one of the reasons for the new FOIA regulations?

Let me know if you have any questions for me Ex. 6 Planning to publish tomorrow morning.

All the best,
Dino

Message

From: Tran, Victoria [tran.victoria@epa.gov]
Sent: 7/24/2019 7:46:05 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: FW: NEW APA/FOIA Litigation: Citizens for Responsibility & Ethics in Washington (CREW) v. EPA, C.A. No. 1:19-cv-2181 (D.D.C.) - EPA FOIA Regulations
Attachments: CREW v EPA Complaint 1 19 cv 2181.pdf

FYI. **Ex. 5 Deliberative Process (DP)**

VT

From: Kelly, Lynn
Sent: Wednesday, July 24, 2019 12:14 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>; OGC GLO FOIA Litigation Team <OGC-GLO-FOIA-Litigation-Team@epa.gov>; OGC FEAT_MGMT <OGC_FEAT_MGMT@epa.gov>
Cc: Youngblood, Charlotte <Youngblood.Charlotte@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Tran, Victoria <tran.victoria@epa.gov>; Blair, Shirley <Blair.Shirley@epa.gov>; Walker, Denise <Walker.Denise@epa.gov>; Epp, Timothy <Epp.Timothy@epa.gov>; Gottesman, Larry <Gottesman.Larry@epa.gov>; Creech, Christopher <Creech.Christopher@epa.gov>
Subject: NEW APA/FOIA Litigation: Citizens for Responsibility & Ethics in Washington (CREW) v. EPA, C.A. No. 1:19-cv-2181 (D.D.C.) - EPA FOIA Regulations

Ex. 5 AC/DP

Lynn Kelly | Temporary Assistant General Counsel for FOIA Litigation & Special Projects | US EPA | Office of General Counsel | 1200 Pennsylvania Ave., NW | WJC North, Mail Code 2377A | Washington, DC 20460 | phone: (202) 564-3266

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,
1101 K Street N.W., Suite 201
Washington, D.C. 20005,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY,
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460, and

ANDREW WHEELER, in his official
capacity as Administrator of the U.S.
Environmental Protection Agency,
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460,

Defendants.

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) brings this action against Defendants U.S. Environmental Protection Agency and Andrew Wheeler, in his official capacity as Administrator of the U.S. Environmental Protection Agency (collectively, “EPA”), alleging as follows:

INTRODUCTION

1. This is an action for injunctive and declaratory relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, challenging EPA’s final rule amending the agency’s Freedom of Information Act (“FOIA”) regulations. *See* FOIA Regulations Update, 84 Fed. Reg. 30,028 (June 26, 2019) (to

be codified at 40 C.F.R. § 2) (“FOIA Rule” or “2019 FOIA Rule”). The FOIA Rule is both procedurally and substantively defective and must therefore be vacated.

2. Under current agency leadership, FOIA administration at EPA has become increasingly politicized. The FOIA Rule is the latest example of that politicization. The rule expressly authorizes political appointees to make “final determinations” on FOIA requests, rather than leaving those decisions to career officials who have the experience and qualifications necessary to make FOIA determinations. And it requires that all FOIA requests be submitted to EPA’s National FOIA Office in Washington, D.C., where most of EPA’s political appointees are located.

3. Despite intense public interest in the FOIA Rule, EPA hastily adopted it without following the APA’s notice-and-comment requirements. In so proceeding, the agency invoked the “procedural rule” and “good cause” exceptions to the APA’s rulemaking procedures. But the FOIA Rule fits neither exception because, among other things, it expressly amends an existing legislative rule that was adopted through notice and comment; it effects substantive changes in the law and adopts new positions that are inconsistent with prior regulations and policy; the changes are not, as EPA claims, compelled by statute; and there is strong public interest in the rule, as evidenced by the outpouring of criticism EPA has received following its announcement.

4. In addition to being procedurally infirm, the FOIA Rule is arbitrary and capricious because it fails to provide a reasoned explanation for the revisions made; fails to acknowledge, let alone provide a reasoned explanation for, significant changes it makes in the agency’s existing regulations and policy; and fails altogether to consider important factors.

5. The FOIA Rule is also contrary to law insofar as it authorizes the agency to segregate and withhold non-responsive portions of responsive records, contrary to FOIA's plain text and the D.C. Circuit's decision in *American Immigration Lawyers Ass'n v. Executive Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016).

6. CREW is a frequent FOIA requester that relies on records obtained through FOIA to fulfill its organizational mission. It has several FOIA requests pending with EPA that implicate politically-sensitive issues and thus are highly likely to undergo political-appointee-review pursuant to the FOIA Rule, and plans to submit similar requests in the future. CREW thus has concrete and particularized interests that are at substantial risk of being adversely affected by the FOIA Rule.

7. Accordingly, CREW respectfully requests that the FOIA Rule be declared unlawful and vacated on the grounds that it was adopted "without observance of procedure required by law," and is "arbitrary, capricious, . . . otherwise not in accordance with law," and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706.

JURISDICTION AND VENUE

8. This action arises under the APA, 5 U.S.C. § 701, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* This Court has personal and subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States).

9. Venue lies in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff CREW is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens

to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the government decision-making process through the dissemination of information about public officials and their actions. To further its mission of promoting government transparency and accountability, CREW frequently files FOIA requests (with EPA and other agencies); disseminates the documents it receives through FOIA requests on its website, www.citizensforethics.org, and social media; and uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public.

11. Defendant EPA is an agency within the meaning of the APA, 5 U.S.C. § 701. EPA operates under the supervision and direction of the EPA Administrator.

12. Defendant Andrew Wheeler is the Administrator of EPA and is sued in his official capacity only.

FACTS

I. EPA's 2002 FOIA Rule

13. Prior to the 2019 FOIA Rule, EPA had last amended its FOIA regulations by final rule issued November 5, 2002. *See* Revised FOIA Regulations, 67 Fed. Reg. 67,303 (Nov. 5, 2002) (codified at 40 C.F.R. § 2) (“2002 FOIA Rule”).

14. In adopting the 2002 FOIA Rule, EPA followed the APA's rulemaking procedures, including notice-and-comment, and expressly invoked the agency's rulemaking authority. *See* 67 Fed. Reg. at 67,304; Revised FOIA Regulations, 65 Fed. Reg. 19,703 (April 12, 2000) (Proposed Rule).

15. Under former § 2.101 and § 2.102, requesters could seek records from EPA headquarters in Washington, D.C. or, if appropriate, any of EPA’s ten regional field offices. 40 C.F.R. §§ 2.101(a), 2.102(a) (2018).

16. Former § 2.103, entitled “Responsibility for responding to requests,” provided that “[i]n general . . . the EPA office that has possession of that record is the office responsible for responding to you.” 40 C.F.R. § 2.103(a) (2018).

17. Former § 2.103 further provided that, regarding the “[a]uthority to grant or deny requests,” the “head of an office, or that individual’s designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate.” 40 C.F.R. § 2.103(b) (2018).

18. Former § 2.104(h) authorized certain political appointees—namely, the “Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices—to issue “*initial* determinations” on FOIA requests, but did not grant those officials authority to issue *final* determinations. 40 C.F.R. § 2.104(h) (2018) (emphasis added).

19. Former § 2.104(h) also restricted who could be delegated authority to issue FOIA determinations, providing that “the authority to issue initial denials of requests for existing, located records (other than initial denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.” 40 C.F.R. § 2.104(h) (2018).

II. Politicization of FOIA at EPA under the Trump Administration

20. Prior to the Trump Administration, political appointees at EPA were rarely involved in FOIA processes. That changed dramatically under the tenure of former EPA Administrator Scott Pruitt.

21. For instance, Mr. Pruitt personally instructed his staff not to respond to FOIA requests relating to his tenure at the agency until requests from the Obama Administration had been completed. This politically-motivated decision was contrary to the “multitrack processing” approach required by EPA’s FOIA regulations, under which requests must be prioritized based on their complexity, rather than the date of receipt. *See* 40 C.F.R. § 2.104(c).

22. Mr. Pruitt also instituted what some have called a “political awareness review” policy, under which political appointees (rather than career officials) reviewed and approved responses to “politically charged” FOIA requests prior to release. “Politically charged” requests included requests seeking communications with the Office of the Administrator or other senior EPA officials.

23. Mr. Pruitt resigned from EPA in July 2018, amid a flurry of ethics scandals.

24. On November 16, 2018, EPA’s Chief of Staff, Ryan Jackson, issued an internal memorandum entitled “Awareness Notification Process for Select Freedom of Information Act Releases,” *available at* <https://bit.ly/2XXYh1D> (“Jackson Memorandum”). The memorandum “sets forth the [FOIA] awareness notification process to be followed at the agency,” and “supersede[d] any prior process, procedure, guidance, or instruction,” seemingly including the political awareness review policy instituted by Mr. Pruitt. Jackson Memorandum at 1.

25. The Jackson Memorandum states that the “awareness notification process is not an approval process.” *Id.* It adds that, “[c]onsistent with the agency’s FOIA policy and procedures, FOIA staff, program staff and program managers will continue to determine whether information should be released or withheld under FOIA’s exemptions.” *Id.* The memorandum then sets forth detailed procedures to be followed in notifying “agency senior leadership” of FOIA responses that “may be of particular interest to the press, the public and/or Congress.” *Id.* at 1-3.

26. Publicly-available data indicates that political-appointee review significantly delays EPA’s FOIA processing times. For instance, data shows that between January 20 and December 29, 2017, only 16.6% of FOIA requests routed to the Office of the Administrator were closed, in sharp contrast to the 78.76% closure rate for all other requests made to EPA during the same period. *See* Andrew Bergman, EPA Drags Its Feet with Records Requests Aimed at Scott Pruitt’s Office, *Project on Gov’t Oversight*, Feb. 25, 2018, available at <https://bit.ly/2GnYnbE>. This is consistent with the general understanding “that the involvement of political appointees making [FOIA] determinations can add unnecessary delays to the [FOIA] review process, potentially violating FOIA’s statutory deadlines.” July 22, 2019 Letter from Sens. Leahy, Grassley, Feinstein, and Cornyn to EPA Administrator Wheeler, available at <https://bit.ly/2StVMS8>.

III. EPA’s 2019 FOIA Rule

27. On June 26, 2019, EPA announced the FOIA Rule, with an effective date of July 26, 2019. 84 Fed. Reg. at 30,028. According to the rule summary, EPA was “tak[ing] final

action to revise the Agency’s regulations under [FOIA] . . . by updating the process by which the public may access information about EPA actions and activities.” *Id.*

28. The FOIA Rule expressly amends EPA’s existing FOIA regulations, as adopted in the 2002 FOIA Rule and codified at 40 C.F.R. § 2. As outlined below, the FOIA Rule alters 40 C.F.R. § 2 in several ways to consolidate decisionmaking authority with EPA political appointees and EPA’s National FOIA Office.

A. Requiring that All Requests be Submitted to EPA’s National FOIA Office

29. Under revised § 2.101, § 2102, and § 2.103(a), all FOIA requests must be submitted to EPA’s National FOIA Office in Washington, D.C. *See* 84 Fed. Reg. at 30,032-33. Upon “receipt of a FOIA request,” the “National FOIA Office will assign the request to an appropriate office within the Agency for processing.” *Id.* at 30,033. This changed the prior regulations, which allowed requesters to submit requests to EPA headquarters or any appropriate regional office, 40 C.F.R. §§ 2.101-103 (2018), and provided that, “[i]n general . . . the EPA office that has possession of that record is the office responsible for responding to you,” *id.* § 2.103(a).

30. The FOIA Rule indicates that these revisions are “required” by, or at least “relate[] to,” the 2007 amendments to FOIA. 84 Fed. Reg. at 30,029-30. But nothing in the 2007 amendments *requires* agencies to centralize the submission process for FOIA requests as EPA has done in the FOIA Rule.

31. The FOIA Rule states that the revision was designed to “minimize the number of misdirected requests sent to the Agency” and “to address” a provision of the 2007 FOIA amendments that “decreased the amount of time an agency may take to route a request to the

appropriate component of the agency to ten-working days or less.” 84 Fed. at 30,030. But the rule does not explain why precluding requesters from submitting FOIA requests to a relevant EPA regional office, and instead requiring them to submit all requests to the National FOIA Office, would minimize the number of misdirected requests or result in timelier processing of requests. In fact, the FOIA Rule is devoid of any analysis of whether requiring that all requests be submitted to the National FOIA Office would further the goals of efficiency or expediency in FOIA processing.

32. Meanwhile, the agency’s latest annual FOIA report shows that EPA Headquarters has a substantially larger FOIA workload and slower processing rates than the agency’s regional offices. *See* EPA FOIA Annual Report for FY 2018 §§ V, XII, VII, *available at* <https://bit.ly/2Lz5h1J> (reporting that 2,772 of the agency’s total 3,730 outstanding FOIA requests at the end of FY 2018 were pending with EPA Headquarters; that EPA Headquarters had 2,360 backlogged requests, whereas the highest backlog at any regional office was 128 requests; and that the average response times were significantly higher at EPA Headquarters than at any regional office in most instances). Similarly, an internal audit of EPA’s FOIA program in 2006 found that only 23% of EPA career staff favored centralizing FOIA processing at EPA headquarters, based on concerns of lack of resources and staffing necessary to support such centralization efforts. *See* Evaluation of EPA’s FOIA Program, Final Report, at 39, 41-42, 46, Feb. 12, 2016, *available at* <https://bit.ly/2ygSOHz>. It follows that increasing the National FOIA Office’s existing FOIA workload, as the FOIA Rule does, will likely lead to *further* delays in FOIA processing. Again, the FOIA Rule fails entirely to address this critical issue.

B. Authorizing Political Appointees to Issue Final FOIA Determinations

33. Revised § 2.103(b) provides that, regarding the “[a]uthority to issue final determinations,” the “Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals’ delegates, are authorized to make determinations required by 5 U.S.C. § 552(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue ‘no records’ responses.” 84 Fed. Reg. at 30,033. This changed the prior regulation, which provided that “[t]he head of an office, or that individual’s designee, is authorized to grant or deny any request for a record of that office or other Agency records when appropriate,” 40 C.F.R. § 2.103(b) (2018), and that the “Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices” only had authority to issue “initial determinations” on FOIA requests, not final determinations, *id.* § 2.104(h). It also reflects a change in existing agency policy and procedures, under which only career staff would “determine whether information should be released or withheld under FOIA’s exemptions.” Jackson Memorandum at 1.

34. The FOIA Rule’s preamble provides the following explanation for this revision: “This change eliminates a potential conflict in the existing regulations and ensures consistency of responses across the Agency. The previous regulations contained a potential inconsistency. EPA simplifies and consolidates section 2.103(b), which empowered the ‘head of an office, or

that individual's designee' to grant or deny requests, and section 2.104(h), which empowered division directors or equivalents authority to issue 'denials.'" 84 Fed. Reg. at 30,031.

35. The FOIA Rule does not explain the agency's reasons for granting authority to issue final FOIA determinations to the specific political appointees listed in revised § 2.103(b). The rule also does not acknowledge that this revision reflects a change in existing agency policy and procedures, under which only career staff would "determine whether information should be released or withheld under FOIA's exemptions," nor does it explain the agency's reasons for changing its position on this issue.

C. Removing Restrictions on Delegating Authority to Issue Final FOIA Determinations

36. As noted, revised § 2.103(b) authorizes certain political appointees and those "individuals' delegates" to issue final determinations on FOIA requests. Revised § 2.104(h), in turn, eliminates the provision stating that "the authority to issue initial denials of requests for existing, located records (other than initial denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent." 40 C.F.R. § 2.104(h) (2018).

37. The FOIA Rule's preamble states this revision "clarifies the authorities, and delegation of the authority, because the term 'division director' is not easily interpreted across the Agency. The Agency does not intend to affect the Agency's use of delegation directives to set forth specific rules and limitations regarding who may be delegated FOIA decision making authority; it is not necessary to set forth such delegations, and limitations, in Agency regulations." 84 Fed. Reg. at 30,031.

38. The FOIA Rule does not acknowledge that the revised regulation outright removes restrictions on delegations of authority put into place by former § 2.104(h), nor does it provide an explanation for this revision, which would seemingly allow the political appointees enumerated in § 2.103(b) to delegate authority to issue final FOIA determinations to anyone at the agency.

D. No Notice and Comment

39. EPA adopted the FOIA Rule without prior notice and comment. The FOIA Rule’s preamble asserts that EPA bypassed the APA’s default rulemaking procedures pursuant to the statute’s “good cause and procedural exceptions,” and appears to invoke both exceptions with respect to the changes outlined above. *See* 84 Fed. Reg. at 30,029. The preamble asserts that the procedural exception applies insofar as the FOIA Rule merely “update[s] the EPA’s rules to accurately reflect the Agency’s organizational structure and implement statutorily directed changes, which are self-executing,” and does “not change the substantive standards the Agency applies in implementing the FOIA to the extent they conform with the Act and the 2007, 2009, and 2016 Amendments.” *Id.* The preamble further claims that the good cause exception applies based on EPA’s determination that “notice and opportunity for comment on the revisions . . . is unnecessary because the agency lacks discretion to reach a different outcome in response to comment.” *Id.*

40. Despite the lack of a notice-and-comment period, the FOIA Rule has generated substantial public interest. To date, a bipartisan group of five members of Congress and over 50 organizations have submitted letters urging the agency not to adopt the FOIA Rule or, at

minimum, to open the rule up to public comment before adopting it.¹ The rule has also received significant media coverage.²

PLAINTIFF'S INJURIES

41. As alleged above in paragraph 10, Plaintiff CREW routinely submits FOIA requests and utilizes records obtained through FOIA as part of its organizational mission of promoting government transparency and accountability.

42. CREW has a particularly strong interest in EPA's FOIA policies and practices. Since 2017, CREW has submitted at least 17 FOIA requests to EPA, 13 of which are still pending. Those pending FOIA requests include the following:

- a. A May 2018 request seeking records relating to EPA's "awareness review" or "senior management review" processes, under which "high-level officials' at EPA are involved in reviewing FOIA responses before they are publicly released";

¹ See July 22, 2019 Letter from Sens. Leahy, Grassley, Feinstein, and Cornyn to EPA, *available at* <https://bit.ly/2StVMS8>; Press Release, Rep. Porter Sounds Alarm on Lack of Transparency in Trump Administration's New Regulation, July 9, 2019, *available at* <https://bit.ly/2XTVcmA>; Env'tl. Integrity Project, et al., Concerns Over EPA's "FOIA Regulations Update" Final Rule, July 9, 2019, *available at* <https://bit.ly/2GInel9>; Reporters Committee for Freedom of the Press, et al., Proposed Revisions to the EPA's FOIA Regulations, July 9, 2019, *available at* <https://bit.ly/30paegY>; June 26, 2019 Letter from Soc'y of Env'tl. Journalists to EPA, *available at* <https://bit.ly/2JDDI5b>.

² See, e.g., Rebecca Beitsch, *Environmental groups fight EPA's new FOIA rule*, *The Hill*, July 8, 2019, *available at* <https://bit.ly/32CWxu0>; Gregory Wallace & Ellie Kaufman, *EPA changes transparency rules*, *CNN*, June 26, 2019, *available at* <https://cnn.it/2xTdN2S>; Meg Cunningham, *EPA rule lets political officials block FOIA document requests*, *Roll Call*, June 26, 2019, *available at* <https://bit.ly/2JFNsMf>; Julia Conley, *Emulating the CIA, New Rule Would Let Trump's EPA Disregard FOIA Requests With Near Impunity*, *Common Dreams*, June 25, 2019, *available at* <https://bit.ly/2O3Wffl>.

- b. A March 2019 request seeking records relating to efforts by the pesticide industry to convince political appointees at EPAs to block public release of a report on certain pesticides' adverse effects on endangered species;
- c. A September 2018 request seeking various categories of records relating to political travel by presidentially-appointed Senate confirmed officials at EPA; and
- d. A July 2018 request seeking communications relating to the company Syngenta, following a decision by EPA leadership to reduce a fine against that company by approximately \$4.79 billion.

43. CREW plans to continue submitting FOIA requests to EPA on matters central to CREW's ongoing research, litigation, advocacy, and public education efforts, including requests implicating high-level political appointees at EPA.

44. There is a substantial, if not certain, risk that the FOIA Rule will adversely impact CREW's pending and future FOIA requests. Insofar as CREW's pending and future requests implicate high-level political appointees at EPA, EPA's responses to those requests will almost certainly be subject to review and approval in accordance with the FOIA Rule's political-appointee review provisions. And insofar as the FOIA Rule requires that *all* requests be submitted to EPA's National FOIA Office and forbids requesters from submitting requests to any regional office, the rule unequivocally requires an immediate change in requesters' FOIA practices. Moreover, it is highly likely that the FOIA Rule will cause increased delay in EPA's responses to CREW's pending and future FOIA requests. Indeed, as alleged above in paragraphs 26 and 32, publicly-available data indicates both that authorizing political appointees to issue

FOIA determinations and requiring that all requests be submitted to the National FOIA Office at EPA Headquarters will lead to further delays in the agency's FOIA processing, impeding CREW's statutory right under FOIA to timely access to requested records. Finally, insofar as the FOIA Rule purports to authorize EPA to withhold information that CREW is entitled to receive by law (e.g., non-responsive portions of responsive records), it further harms CREW.

45. Accordingly, CREW has concrete and particularized interests that will be impaired by the FOIA Rule.

PLAINTIFF'S CLAIMS FOR RELIEF

Count 1

(Violation of APA – Failure to Comply with Rulemaking Procedures)

46. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

47. EPA's promulgation of the FOIA Rule constitutes rulemaking within the meaning of the APA, 5 U.S.C. § 551(5), and was therefore subject to the APA's notice-and-comment requirements, 5 U.S.C. § 553.

48. EPA's promulgation of the FOIA Rule without complying with the APA's notice-and-comment requirements was without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706.

49. The FOIA Rule does not qualify as a "interpretative rule[], general statement[] of policy, or rule[] of agency organization, procedure, or practice" exempt from notice and comment under 5 U.S.C. § 553(b)(3)(A) because, among other things, the FOIA Rule expressly amends an existing legislative rule that was adopted through notice and comment and codified in the Code of Federal Regulations; it adopts a new position inconsistent with existing regulations

or policy and otherwise effects a substantive change in existing regulations or policy; and it trenches on substantial private rights and interests.

50. The FOIA Rule does not demonstrate that notice and comment is “unnecessary” under the “good cause” exemption of 5 U.S.C. § 553(b)(3)(B) because, among other things, the revisions identified above are not, as EPA claims, compelled by statute. Nor could the rule be characterized as insignificant in nature and impact or inconsequential to the public, particularly given the intense public interest the rule has already generated.

Count 2
(Violation of APA – Arbitrary and Capricious Agency Action)

51. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

52. The FOIA Rule is agency action within the meaning of the APA, 5 U.S.C. § 551(13).

53. The FOIA Rule is arbitrary and capricious agency action within the meaning of the APA, 5 U.S.C. § 706, because, as outlined above in paragraphs 29-38, it fails to provide a reasoned explanation for each of the revisions made; it fails altogether to acknowledge that certain revisions reflect changes in existing agency regulations and policy, and likewise fails to provide any explanation for those changes; and it fails altogether to consider important factors.

Count 3
(Violation of APA – Agency Action Contrary to Law)

54. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

55. The FOIA Rule is agency action within the meaning of the APA, 5 U.S.C. § 551(13).

56. Insofar as § 2.103(b) of the FOIA Rule purports to authorize agency officials to “withhold . . . a portion of a record on the basis of responsiveness,” 84 Fed. Reg. at 30,033, it violates FOIA. *See American Immigration Lawyers Ass’n v. Executive Office for Immigration Review*, 830 F.3d 667, 677-79 (D.C. Cir. 2016) (holding that FOIA does not allow agencies to redact non-responsive, non-exempt portions of responsive records).

57. Accordingly, § 2.103(b) of the FOIA Rule is “not accordance with law” and “in excess of statutory jurisdiction, authority, or limitations” under the APA, 5 U.S.C. § 706.

Count 4 (in the alternative to Count 3)
(Violation of FOIA – Unlawful Policy or Practice)

58. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

59. Insofar as the claim alleged above in Count 3 is deemed to seek relief challenging an unlawful FOIA policy or practice within the Court’s equitable authority under FOIA, 5 U.S.C. § 552(a)(4)(B), Plaintiff pleads such a claim under FOIA in the alternative to Count 3.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that EPA violated the APA in issuing the 2019 FOIA Rule and that the rule is unlawful;
2. Vacate the 2019 FOIA Rule and direct EPA to reinstate the 2002 FOIA Rule;
3. Award Plaintiff its costs and reasonable attorneys’ fees in this action; and
4. Grant any other relief the Court deems appropriate.

Date: July 23, 2019

/s/ Nikhel Sus

NIKHEL S. SUS

(D.C. Bar No. 1017937)

ANNE L. WEISMANN

(D.C. Bar. No. 298190)

Citizens for Responsibility and Ethics in
Washington

1101 K St. NW, Suite 201

Washington, D.C. 20005

Telephone: (202) 408-5565

Fax: (202) 588-5020

nsus@citizensforethics.org

aweismann@citizensforethics.org

Counsel for Plaintiff

Message

From: White, Elizabeth [white.elizabeth@epa.gov]
Sent: 7/24/2019 6:44:01 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: Automatic reply: Questions from Washington Post about new FOIA rule

Thank you for your email. I am currently out of the office and will return on Tuesday, July 30. I will have limited access to email. If you need assistance with respect to FOIA requests, please contact Victoria Tran and 202-564-0536. For all other inquiries, please contact Brian Hope at 202-564-8212.

Regards,
Beth White

Message

From: Dawn Reeves [dreeves@iwpnews.com]
Sent: 7/24/2019 6:04:59 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: RE: another FOIA question

Got it.

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 24, 2019 1:11 PM
To: Dawn Reeves <dreeves@iwpnews.com>; Press <Press@epa.gov>
Subject: RE: another FOIA question

We don't comment on pending litigation, but you have our other statement as well.

From: Dawn Reeves <dreeves@iwpnews.com>
Sent: Wednesday, July 24, 2019 1:05 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: another FOIA question

Hi,

It's Dawn at Inside EPA. I know I asked you about the FOIA rule yesterday re the letter from the four senators but I am writing again to reference the CREW lawsuit filed yesterday asking the court to vacate the rule as unlawful, and the Grassley, et al. bill introduced to address some of the changes they are unhappy with.

Does EPA have a different statement re these events? Or the same statement?

Please let me know, thanks!

Dawn Reeves

Ex. 6 Personal Privacy (PP)

Message

From: Willey, Katharine [willey.katharine@epa.gov]
Sent: 6/27/2019 3:42:13 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: Draft Letter from OGC on Updated Reg Roll Out
Attachments: Draft Correcting the Narrative Letter Template.ebp.docx

Abboud—attached is a draft letter

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Let me know if you have any questions.

K

Ex. 6 Personal Privacy (PP)

Message

From: Norberto Santana [nsantana@voiceofoc.org]
Sent: 7/11/2019 9:26:54 PM
To: Abboud, Michael [abboud.michael@epa.gov]
Subject: Re: Press inquiry about recent changes to EPA rule on FOIA requests
Attachments: PastedGraphic-1.pdf

Michael,

Thanks for your quick response.

So your point is these political appointees always had the ability to be in the process, your rule just codifies that and names them?

It does seem that the effort to centralize requests does have the potential to politicize the FOIA process, regardless of administration.

Would appreciate your thoughts on that.

Lastly, why did EPA not allow public comment on the rule?

Again,

Thanks for engaging and your quick response.

Best,

Norberto

Norberto Santana, Jr.
Publisher

P.O. Box 10020 | Santa Ana, CA 92711

949-374-0402 | nsantana@voiceofoc.org

On Jul 11, 2019, at 2:06 PM, Abboud, Michael <abboud.michael@epa.gov> wrote:

“After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. This rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” – **Michael Abboud, EPA spokesman**

I also would refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>

Sent from my iPhone

On Jul 11, 2019, at 4:49 PM, Norberto Santana <nsantana@voiceofoc.org> wrote:

I am a reporter workign on deadline regarding the new changes to FOIA requests at EPA.

I have seen concerns by environmental groups and recent coverage in the Hill.

I would like to get a statement from EPA on the new rule.

Would also welcome a chance to speak to an EPA spokesperson on the rule.

My dealine is Friday.

Thanks,

Norberto

Norberto Santana, Jr.
Publisher

P.O. Box 10020 | Santa Ana, CA 92711

949-374-0402 | nsantana@voiceofoc.org

<PastedGraphic-1.pdf>

Message

From: Rodriguez, Alejandra [rodriguez.alejandra@epa.gov]
Sent: 7/11/2019 1:13:53 PM
To: AO OPA Individual News Clips [AO_OPA_Ind_News_Clips@epa.gov]
Subject: The Hill: Growing Criticism of EPA FOIA Rule

The Hill

Growing Criticism of EPA FOIA Rule

<https://thehill.com/policy/energy-environment/overnights/452512-overnight-energy-trump-threatens-veto-on-defense-bill>

Rebecca Beitsch

A Democratic lawmaker along with a group of nearly 40 media publications are raising concerns over a new Environmental Protection Agency (EPA) public information rule that could allow political officials more leeway to withhold requested documents.

In a letter sent Tuesday evening, Rep. Katie Porter (D-Calif.) asked EPA chief Andrew Wheeler to review and revise the Freedom of Information Act (FOIA) rule, which she argues shrouds the process in secrecy and failed to go through the typical public comment period.

"Government transparency is central to our democracy. At a time when climate change threatens our communities, public access to the government's work to address this crisis is essential," Porter wrote.

"The rule, as published by EPA, will make the public process for accessing information more opaque. It is particularly concerning that the EPA chose to write this rule without public input."

The Hill was first to report on the finalized rule change, submitted to the public record at the end of June without public comment.

"Before choosing to substantially and formally change the FOIA process at EPA, members of the public should be afforded the opportunity to weigh in with the agency regarding this proposal," Porter wrote.

The agency has argued it did not need to put the rule through a public comment period, pointing to several procedural exemptions.

"It is routine for agencies to update their FOIA regulations to reflect self-executing statutory provisions," a senior EPA FOIA official told The Hill.

Why the change is controversial: According to the new language in the EPA's FOIA rule, the administrator and other officials would be allowed to review all materials that fit a FOIA request criteria, known as responsive documents, and then decide "whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses."

Lawyers outside the agency who specialize in FOIA requests say the "no records" response could lead to a situation where records seekers are being told there are no documents meeting their search criteria, even if they were found by EPA staffers who handle the requests, with those documents ultimately withheld by political appointees.

The EPA's side: The agency has denied the characterization of the language, arguing the specification in the rule simply states officials have the right to tell requesters there were no records responsive to them. The EPA also denied that the number of political officials allowed to view FOIA requests prior to release was expanded under the latest rule, arguing they had the same powers in the previous version.

But it's not just lawmakers: Also Tuesday, the Society for Environmental Journalists along the Reporters Committee for Freedom of the Press and 37 other news media organizations sent a letter to the EPA asking it to suspend the implementation of the FOIA rule in order to allow a public comment period.

"The News Media Coalition is deeply concerned about the Proposed Rule, which contains provisions that undermine the Act, are impermissible under clear, binding D.C. Circuit precedent, and would diminish journalists' ability to gather and report information to the public about the actions of the EPA and its personnel," the group wrote.

News organizations that signed the letter include The Associated Press, Politico, Gannett, McClatchy, The New York Times and The New Yorker.

The latest Society for Environmental Journalists letter comes after the nonprofit previously raised flags over the rule at the end of June, a letter which the EPA later derided as containing "numerous inaccuracies."

Message

From: Kazempoor, Kelly [kazempoor.kelly@epa.gov]
Sent: 7/10/2019 7:08:54 PM
To: AO OPA Individual News Clips [AO_OPA_Ind_News_Clips@epa.gov]
Subject: Greenwire: Press, green groups urge delay for FOIA regs

Greenwire

Press, green groups urge delay for FOIA regs

<https://www.eenews.net/greenwire/stories/1060721531/search?keyword=EPA>

Kevin Bogardus, E&E News reporter

Media groups have pushed back against EPA's new regulation on how to handle Freedom of Information Act requests, appealing to the agency to hold off on implementing the rule.

In a letter sent yesterday to EPA, 39 news organizations raised concerns about the rule's provisions that they say would undermine FOIA, clash with court opinion and "diminish journalists' ability to gather and report information to the public about the actions of the EPA and its personnel."

"For these reasons, the News Media Coalition urges the EPA to suspend implementation of the Proposed Rule and open it to public comment for a period of no fewer than 60 days," said the letter. The Reporters Committee for Freedom of the Press, the Associated Press, the National Press Club and the New York Times Co. were some of the groups that signed the letter.

EPA's FOIA rule is set to go into effect on July 26. The agency has not opened the proposal for public comment, saying it can do so in order to comply with the amended public records law and reflect internal changes at the agency.

EPA has not updated its FOIA regulations since 2002. Since then, Congress has amended the law three times in 2007, 2009 and 2016.

But although the agency has said the proposal is consistent with its past FOIA regulations, it has generated widespread opposition, particularly over language saying top political officials at EPA have authority to issue final determination on public records requests.

The news coalition takes issue with that part of the rule, which says senior political appointees can decide "whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue 'no records' responses."

Critics have cited a 2016 U.S. Court of Appeals for the District of Columbia Circuit opinion that said there is nothing within FOIA that allows agencies to redact particular information from responsive records based on that information's said responsiveness (E&E News PM, June 26).

Environmental groups have also organized to push back against EPA's FOIA regulation, citing that court opinion as well.

In a letter yesterday to EPA Administrator Andrew Wheeler, 16 green and public interest groups also called on the agency to stall the rule.

"We strongly urge EPA to delay implementation of the Rule until the Agency has conducted a sufficient period of notice and comment, in accordance with the requirements of the Administrative Procedure Act," they said.

The Environmental Integrity Project, Center for Biological Diversity and Sierra Club were some of the groups that signed onto the letter.

EPA may have to deal with Congress in response to the regulation. Sen. Chuck Grassley (R-Iowa) said last month he was working on legislation and criticized EPA and the Department of the Interior, which has proposed its own scrutinized public records regulations, for their actions on FOIA (E&E News PM, June 27).

EPA spokesman Michael Abboud referred E&E News to the agency's previous press releases defending the FOIA regulation when contacted for this story.

The agency has pushed back against criticism of the proposal. It released a letter from career EPA officials who helped handle FOIA to address "significant misrepresentations" in response to the Society of Environmental Journalists.

SEJ replied in another letter yesterday, offering to meet in person or over the phone "to discuss how the EPA can hew more closely to the essence of the Freedom of Information Act."

Message

From: Jackson, Ryan [jackson.ryan@epa.gov]
Sent: 6/26/2019 5:06:54 PM
To: Abboud, Michael [abboud.michael@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Konkus, John [konkus.john@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: Re: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Ex. 5 Deliberative Process (DP)

Sent from my iPad

On Jun 26, 2019, at 12:04 PM, Abboud, Michael <abboud.michael@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

From: Meaghan Parker <mparker@sej.org>
Sent: Wednesday, June 26, 2019 12:55 PM
To: Wheeler, Andrew <wheeler.andrew@epa.gov>
Cc: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Mutz, John (Fletcher) <mutz.john@epa.gov>; Creech, Christopher <Creech.Christopher@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>
Subject: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Dear Administrator Wheeler:

The Society of Environmental Journalists (SEJ) objects to EPA's June 26 Final Rulemaking entitled "Freedom of Information Act Regulations Update." It enables the agency to limit public access to EPA records that are legally public information. Moreover, the highly irregular procedure of issuing a final rule without proposal or public comments is unjustified and unlawful under the Administrative Procedure Act (APA).

SEJ is a professional and educational organization that represents 1,400 environmental journalists, professors and students. Our members, on behalf of the public, rely on FOIA to help the public understand the work of the U.S. Environmental Protection Agency. We are deeply concerned that the published FOIA rule changes will seriously harm the public's right to know.

Your claim to exempt this rulemaking from normal APA proposal-and-comment procedures is highly unusual and unwarranted. Moreover, we believe that it serves only to shield highly political decisions from public scrutiny. Neither the procedural nor the good cause exemptions to the APA apply to important parts of this rulemaking — which go beyond required updates to the regulation to drastically change EPA's handling of information requests. We strongly disagree with EPA's assertion that public discussion of this rulemaking is "impracticable, unnecessary, or contrary to the public interest." Circumventing the usual public comment process is a violation of the public trust and silences the voices of the citizens the EPA is bound to protect.

One of the rule's most worrisome changes grants authority to the Administrator (and a hierarchy of other political appointees) to determine which records are "responsive" to a FOIA request. This determination takes place entirely before the records are reviewed or redacted for legitimate FOIA exemptions. It is arbitrary and invisible, and virtually impossible to appeal, because the agency need not

disclose to the requester what records were initially found or why they were deemed non-responsive. This provision badly distorts the true and proper meaning, under FOIA, of "responsiveness."

Another disturbing change centralizes final authority to grant or deny FOIA requests in the political parts of EPA headquarters. By altogether removing the authority of Regional Offices to grant FOIA requests, this change will slow and hobble the agency's already poor performance, in addition to politicizing the decision-making process.

The rule furthermore tries to legitimize the placement of the National FOIA Office under the Office of General Counsel. This is contrary to recent statutory changes, which emphasize the independence of the agency's Chief FOIA Officers.

Many of our members report that EPA's lack of speedy handling of, and responsiveness to, FOIA requests already makes it difficult for them to do their job of informing the public about the environment in which they live. This new rule, we believe, will make that job even more difficult. It will impede the public's access to environmental information and its right to know how tax dollars are spent.

We call on you to withdraw this rule and submit it for standard notice and comment as a proposal — thereby allowing a proper, meaningful public evaluation of its consequences.

Sincerely,
Meaghan E. Parker
Executive Director

Cc: leopold.matt@epa.gov
mutz.john@epa.gov
creech.christopher@epa.gov
schiermeyer.corry@epa.gov
abboud.michael@epa.gov

Meaghan Parker
Executive Director
Society of Environmental Journalists
P:(202) 558-2033 E: mparker@sej.org



<Administrator Wheeler_SEJ_June262019.pdf>

Message

From: Alex Guillen [aguillen@politico.com]
Sent: 7/22/2019 8:24:31 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Press [Press@epa.gov]
Subject: RE: Comment on senators' FOIA letter?

Got it, thanks

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Monday, July 22, 2019 4:12 PM
To: Alex Guillen <aguillen@politico.com>; Press <Press@epa.gov>
Subject: RE: Comment on senators' FOIA letter?

"Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA's FOIA program. After many years of delay, EPA's FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible." – **Michael Abboud, EPA spokesman**

From: Alex Guillen <aguillen@politico.com>
Sent: Monday, July 22, 2019 3:22 PM
To: Press <Press@epa.gov>
Subject: Comment on senators' FOIA letter?

Hello,

I'm writing a Whiteboard item on today's letter to EPA from a bipartisan group of senators regarding EPA's recent FOIA regulation update. The rule "purports to make numerous changes to the EPA's FOIA process that appear to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA," they wrote. Does EPA have a response to the senators?

Thanks,

Alex Guillen | Energy Reporter | **POLITICOPRO**
1000 Wilson Boulevard, 8th Floor | Arlington, VA 22209
Phone: 703.341.4619
Email: aguillen@politico.com | Twitter: [@alexaguillen](https://twitter.com/alexaguillen) | Website: www.POLITICOPro.com

Message

From: Miranda Green [mgreen@thehill.com]
Sent: 7/24/2019 5:01:05 PM
To: Press [Press@epa.gov]
Subject: Fwd: Lawsuit against EPA challenging the new EPA FOIA regulation
Attachments: complaint_filed.pdf

Looking for comment on one of two lawsuits filed today against EPA FOIA policy.

Thanks,
Miranda

----- Forwarded message -----

From: Chris Sproul **Ex. 6 Personal Privacy (PP)**
Date: Wed, Jul 24, 2019 at 12:22 PM
Subject: Lawsuit against EPA challenging the new EPA FOIA regulation
To: <mgreen@thehill.com>

Ms. Green,

Given your past story on EPA's new FOIA regulation, I thought you would be interested in the lawsuit we filed against EPA this morning. See the below and attached. Can you please let us know if you decide to write a story on this?

Thanks!

--Chris Sproul

Environmental Groups Sue Environmental Protection Agency
for New Regulations Implementing Freedom of Information Act
That Seek to Hide Information From the Public

(San Francisco, CA) -- A lawsuit filed today in the Federal District Court in Northern California against the Environmental Protection Agency (EPA) claims that EPA's new regulations implementing the Freedom of Information Act (FOIA) are illegal. These regulations, promulgated without legally required public input, are intended to prevent the public from successfully submitting FOIA requests, hide information the public requests under FOIA, and further slow EPA's response to FOIA requests, which already often takes years.

Plaintiffs in the lawsuit are Ecological Rights Foundation (ERF) and Our Children's Earth Foundation (OCE), two California based organizations focused on preventing environmental harm. ERF and OCE both have long histories of making FOIA requests to EPA to ensure that polluting industry actors are being held accountable, that EPA is properly enforcing environmental laws, and that EPA is acting ethically and in accordance with good governance.

Today's lawsuit is the latest action in the campaign to get EPA to comply with FOIA. ERF has recently filed two lawsuits, one in San Francisco and one in Washington, D.C., challenging specific EPA failures to comply with five individual requests as well as its pattern and practice of violating FOIA more generally.

"EPA has been thumbing its nose at FOIA compliance for years. However, it has recently ramped up this disregard for the law with formal policies, and now new regulations, that seek to deprive the public of the

information that is their right under FOIA,” said Christopher Sproul, Lead Attorney who filed the lawsuit. “The fact that EPA didn’t even give the public a chance to comment on these changes adds insult to injury. EPA flatly doesn’t care what the people think and is doing everything it can to avoid telling them what it is doing.”

Today’s lawsuit identifies several specific instances where EPA’s new FOIA regulations violate the law. These include:

- EPA will now centralize its FOIA processing activities at its Washington, D.C. Headquarters, which will reduce the number of staff working on fulfilling requests, provide increased opportunity for political interference, and further slow the already interminable delays in EPA’s FOIA processing.
- EPA purports to allow the EPA Administrator (currently Andrew Wheeler) to make FOIA determinations in the first instance, but FOIA is structured to avoid this result. EPA’s decision introduces political inference into the objective FOIA determination process and removes a statutorily mandated appeals process.
- EPA purports to make the “date-of-request” the presumptive search cut-off date for FOIA requests, but this ignores that EPA virtually never meets its statutory 20-day determination deadline, meaning that records received after months or years of additional delay are stale by the time they are provided to the requester.
- EPA purports to allow itself to withhold portions of records even where it admits that those portions are not subject to one of FOIA’s nine exclusive exemptions.

EPA’s decision to promulgate these regulations without providing the public with notice and an opportunity to comment ignores explicit statutory notice and comment requirements in both FOIA and the Administrative Procedure Act.

-- Chris Sproul

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Christopher A. Sproul
Environmental Advocates
5135 Anza Street
San Francisco, California 94121
Ex. 6 Personal Privacy (PP)
Fax: (415) 358-5695
Email: csproul@enviroadvocates.com

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Miranda Green
Energy and Environment Reporter, The Hill
Ex. 6 Personal Privacy (PP)
mgreen@thehill.com
[@mirandacgreen](#)

1 Christopher Sproul (State Bar No. 126398)
2 ENVIRONMENTAL ADVOCATES
3 5135 Anza Street
4 San Francisco, California 94121
5 Telephone: (415) 533-3376
6 Facsimile: (415) 358-5695
7 Email: csproul@enviroadvocates.com

8 Attorney for Plaintiffs
9 ECOLOGICAL RIGHTS FOUNDATION and
10 OUR CHILDREN'S EARTH FOUNDATION

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 ECOLOGICAL RIGHTS FOUNDATION, a
14 non-profit corporation, and OUR CHILDREN'S
15 EARTH FOUNDATION, a nonprofit
16 corporation,

17 Plaintiffs,

18 v.

19 UNITED STATES ENVIRONMENTAL
20 PROTECTION AGENCY,

21 Defendant.

Civil Case No. 19-cv-4242

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Plaintiffs Ecological Rights Foundation (“EcoRights”) and Our Children’s Earth Foundation (“OCE”)
2 allege as follows:

3 INTRODUCTION

4 1. Plaintiffs bring this action under the Administrative Procedure Act (“APA”) and the
5 Freedom of Information Act (“FOIA”) to challenge the United States Environmental Protection
6 Agency’s (“EPA”) newly promulgated regulations implementing FOIA, 5 U.S.C. § 552. *See* 84 Fed.
7 Reg. 30,028 (June 26, 2019) (hereinafter “EPA’s FOIA Regulations”). EPA’s FOIA Regulations violate
8 the letter and spirit of FOIA and represent the latest example of EPA’s ongoing attack on government
9 transparency and accountability. In addition, EPA’s promulgation of the EPA FOIA Regulations was
10 illegal procedurally because EPA excluded the public from its decisionmaking process and promulgated
11 the Regulations without notice and comment rulemaking. Plaintiffs seek an order declaring that EPA’s
12 FOIA Regulations are illegal, vacating their approval, and requiring that EPA provide at least a 30-day
13 public comment period before promulgating new FOIA regulations.

14 JURISDICTION

15 2. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 and 5 U.S.C. § 704. The
16 requested relief is proper under 28 U.S.C. §§ 2201 and 2202, 5 U.S.C. § 706(2), and 5 U.S.C. §
17 552(a)(4)(B).

18 3. This Court has personal jurisdiction over EPA and its officials because EPA is an agency
19 of the federal government operating within the United States.

20 VENUE

21 4. Venue in the United States District Court for the Northern District of California is proper
22 under 28 U.S.C. § 1391(e) because at least one defendant resides in the judicial district, a substantial
23 part of the events giving rise to this litigation occurred within this judicial district, the Plaintiffs reside
24 within this judicial district, and there is no real property involved in the action.

25 INTRADISTRICT ASSIGNMENT

26 5. Intradistrict assignment of this matter to the San Francisco Division of the Court is
27 appropriate pursuant to Civil Local Rule 3-2(d) because Plaintiffs’ principal counsel resides in San

1 Francisco County, EcoRights' principal place of business is located in Garberville, California, and
2 OCE's principal place of business is located in Napa, California.

3 **THE PARTIES**

4 6. ECOLOGICAL RIGHTS FOUNDATION ("EcoRights") is a non-profit, public benefit
5 corporation, organized under the laws of the State of California, devoted to furthering the rights of all
6 people to a clean, healthful, and biologically diverse environment. To further its environmental
7 advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal
8 environmental laws and, as necessary, directly initiates enforcement actions on behalf of itself and its
9 members.

10 7. OUR CHILDREN'S EARTH FOUNDATION ("OCE") is a non-profit corporation based
11 in Napa, California dedicated to protecting the environment. OCE promotes public awareness of
12 domestic and international environmental impacts through information dissemination, education, and
13 private enforcement of environmental protection statutes. OCE enforcement cases aim to achieve public
14 access to government information, ensure proper implementation of environmental statutes and
15 permitting, and enjoin violations of environmental and government transparency laws. OCE has an
16 active membership of people from all over the United States with a significant portion of its members
17 residing in the San Francisco Bay Area.

18 8. Plaintiffs bring this action on their own behalf and on behalf of their adversely affected
19 members and staff. Plaintiffs work in furtherance of their goals in part by acquiring information
20 regarding federal programs and activities through FOIA. Plaintiffs then compile and analyze that
21 information and, subsequently, disseminate that information to their membership, the general public, and
22 public officials through various sources, including reports posted on their websites and other websites
23 and through television, radio, and print media interviews. Plaintiffs' successful efforts at educating the
24 public on issues concerning federal government programs and activities that affect the environment and
25 government transparency contribute significantly to the public's understanding of governmental
26 operations and activities. Plaintiffs also use the information that they acquire through FOIA to
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1 participate in federal decisionmaking processes, to file administrative appeals and civil actions, and
2 generally to ensure that federal agencies comply with federal environmental and transparency laws.

3 9. Plaintiffs regularly use FOIA as an important avenue for gaining information about
4 agency activities. Plaintiffs are harmed by EPA's failure to properly implement FOIA, which threatens
5 Plaintiffs' ability to receive complete and timely record productions in response to their current and
6 future FOIA requests to EPA. Without the information they obtain through FOIA, Plaintiffs cannot
7 successfully serve as effective public interest watchdogs ensuring that EPA is lawfully fulfilling its
8 statutory duties.

9 10. Plaintiffs intend to continue their use of FOIA to access agency records in the possession
10 of EPA. Specifically, Plaintiffs have concrete plans to regularly submit additional FOIA requests to EPA
11 as their advocacy efforts continue, and to follow up on the information learned while reviewing agency
12 records responsive to current and future FOIA requests. Plaintiffs also plan to continue to challenge,
13 through litigation and policymaking avenues, EPA's failure to comply with the requirements of FOIA,
14 as evidenced by EcoRights' two pending FOIA lawsuits discussed below.

15 11. One of the purposes of FOIA is to promote the active oversight role of public advocacy
16 groups incorporated in many federal laws applicable to federal agencies. Plaintiffs use FOIA to
17 publicize activities of federal agencies and to mobilize the public to participate in advocacy to elected
18 and other government officials concerning environmental policies. Plaintiffs intend to continue using
19 FOIA requests to fulfill their oversight and advocacy role through scrutinizing agency records, a practice
20 Congress intended to promote through the adoption of FOIA. EPA's FOIA Regulations will delay
21 production of records and result in additional records being improperly withheld. This will prevent
22 Plaintiffs from assessing whether EPA is adequately enforcing the nation's environmental laws and
23 acting ethically and responsibly. This harm can be remedied in part by ensuring Plaintiffs have prompt
24 access to public records going forward, which requires vacating EPA's FOIA Regulations.

25 12. In addition, EPA's decision to promulgate EPA's FOIA Regulations without notice and
26 comment rulemaking prevented Plaintiffs from providing input on the Regulations that could have led
27 EPA to make changes to the Regulations that would have improved government transparency. EPA's

1 failure to provide notice of its proposed rule and an opportunity to comment on it harmed Plaintiffs and
2 denied them a statutory right that they otherwise would have used to influence government
3 decisionmaking. This harm can be remedied in part by vacating EPA's FOIA Regulations and ensuring
4 that EPA promulgates new FOIA regulations, if any, pursuant to notice and comment rulemaking.

5 13. Plaintiffs, their staff, or one or more of their members have and will suffer direct injury
6 by the EPA's failure to comply with the statutory requirements of the APA and FOIA, and a favorable
7 outcome of this litigation will redress that injury. EPA's FOIA Regulations are illegal and EPA's failure
8 to follow mandatory public involvement requirements in the promulgation of those Regulations has
9 prevented Plaintiffs from participating in EPA's decisionmaking process and ensuring that EPA
10 adequately protects the public and the environment from serious harm, follows the law, and behaves
11 ethically. Harm to the Plaintiffs flows from EPA's violations of the law, which conceal the facts and
12 circumstances of EPA's current management and activities and thwarts Plaintiffs in their public
13 education and environmental protection efforts.

14 14. Defendant EPA is an agency that is responsible for administering and implementing the
15 nation's environmental laws. FOIA charges EPA with the duty to provide public access to agency
16 records in its possession or control. The APA forbids EPA from taking action that is arbitrary,
17 capricious, not in accordance with law, or without observance of procedure required by law.

18 15. EPA's FOIA Regulations violate the APA and FOIA because they will impede Plaintiffs
19 and other members of the public from successfully submitting FOIA requests to EPA, will significantly
20 impair Plaintiffs' and other requesters' ability to obtain records, will significantly increase the time it
21 takes for Plaintiffs and other requesters to receive their requested records, will further delay EPA's
22 response to FOIA requests, will insert political interference into what should be an objective
23 determination process, will eliminate administrative review processes provided for in FOIA, will
24 improperly constrain the scope of FOIA productions, will withhold information from FOIA productions
25 that is not within an exemption, and will otherwise interfere with FOIA's government transparency and
26 accountability goals. EPA's decision to promulgate EPA's FOIA Regulations without notice and
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comment rulemaking also violates both the APA and FOIA by failing to follow the procedures required under those laws.

STATUTORY AND REGULATORY BACKGROUND

16. Judicial review of the substance of EPA's rulemaking is governed by section 706 of the APA. 5 U.S.C. § 706. Under the APA, "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

17. EPA's action is arbitrary and capricious "if the agency has relied on factors Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered 'an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 962 (9th Cir. 2006) (internal citation omitted). The arbitrary and capricious standard is deferential, but it does not "shield" EPA's decisions from a "thorough, probing, in-depth review." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). EPA must articulate "a rational connection between the facts found and the conclusions made." *Ore. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). EPA is not entitled to deference where its conclusions "do not have a basis in fact." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001).

18. The Court can only uphold an EPA decision on the basis of the reasoning found in that decision, it cannot substitute reasons for agency action that are not in the record. *Anaheim Mem. Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

19. The process for EPA rulemaking is also governed by section 706 of the APA. 5 U.S.C. § 706. Under the APA, "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

20. Before EPA can adopt a final rule, the APA requires that it provide notice of its proposed rule in the Federal Register and an opportunity for public comment. 5 U.S.C. § 553(b), (c).

1 The APA's "notice and comment" requirements do not apply "to interpretative rules, general statements
 2 of policy, or rules of agency organization, procedure, or practice" or "when the agency for good cause
 3 finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the
 4 public interest." 5 U.S.C. § 553(b). However, these exceptions are quite narrow and also do not apply
 5 where notice and comment rulemaking is required by another statute. *See id.*; *Mack Trucks, Inc. v. EPA*,
 6 682 F.3d 87, 93 (D.C. Cir. 2012) ("[w]e have repeatedly made clear that the good cause exception 'is to
 7 be narrowly construed and only reluctantly countenanced.'" (citations omitted). The good cause
 8 exemption is further "confined to those situations in which the administrative rule is a routine
 9 determination, insignificant in nature and impact, and inconsequential to the industry and to the public"
 10 and does not apply where members of the public are "greatly interested" in the rulemaking at
 11 issue. *Mack Trucks*, 682 F.3d at 94 (citations omitted). The procedural exception only applies where the
 12 rulemaking at issue contains no "value judgment." *Nat'l Ass'n of Waterfront Employers v. Chao*, 587 F.
 13 Supp. 2d 90, 100-01 (D.D.C. 2008).

14 21. FOIA explicitly requires notice and comment rulemaking where the regulations being
 15 promulgated address aggregation of certain requests, the schedule of fees applicable to the processing of
 16 requests, expedited processing of requests, and multi-track processing. *See* 5 U.S.C. § 552(a)(6)(B)(iv)
 17 (aggregation); 5 U.S.C. § 552(a)(4)(A)(i) (schedule of fees); 5 U.S.C. § 552(a)(6)(E)(i) (expedited
 18 processing); 5 U.S.C. § 552(a)(6)(D)(i) (multi-track processing).

19 22. FOIA's "basic objective" is "the fuller and faster release of information." *Oglesby v.*
 20 *Dep't of Army*, 920 F.2d 57, 64 n.8 (D.C. Cir. 1990). In service of this goal, FOIA lays out a
 21 comprehensive statutory scheme requiring that EPA timely divulge its records regardless of whether it
 22 would like to. *See, e.g., U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep.
 23 No. 813, 89th Cong., 1st Sess., 3 (1965)). Under FOIA, EPA is required to make a determination on any
 24 FOIA request that it receives within 20 working days, immediately notify the party making the request
 25 of such determination, the reasons for the determination, and the party's right to appeal that
 26 determination to the "head of the agency," here the Administrator of EPA. 5 U.S.C. § 552(a)(6)(A)(i).

1 EPA must then promptly produce all requested records that are responsive to that request and that are
2 not subject to one of FOIA's exclusive list of nine statutory exemptions. 5 U.S.C. § 552(a)(3)(A).

3 23. The courts have emphasized the narrow scope of the FOIA exemptions and "the strong
4 policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal*
5 *States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980); *NLRB v. Robbins Tire &*
6 *Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry,
7 vital to the functioning of a democratic society, needed to check against corruption and to hold the
8 governors accountable to the governed."). The FOIA Improvement Act of 2016 further reigned these
9 restrictions in, requiring disclosure of information that meets an exemption unless disclosure would
10 harm an interest protected by the exemption – what is referred to as the "foreseeable harm standard." *See*
11 5 U.S.C. § 552(a)(8)(A)(i).

12 24. FOIA was amended in 2007 to reaffirm that Congress, through FOIA, continues to seek
13 to "ensure that the Government remains open and accessible to the American people and is always based
14 not upon the 'need to know' but upon the fundamental 'right to know.'" Pub. L. No. 110-175, 121 Stat.
15 2524, Section 2 ¶6 (2007); *see also Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172-73
16 (2004) (FOIA is "a means for citizens to know what their Government is up to." This phrase should not
17 be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.") (internal
18 citation omitted).

19 25. Recognizing that FOIA requesters are harmed when agencies do not ensure prompt
20 public access to agency records, Congress has repeatedly amended FOIA to address unreasonable
21 agency delay. *See, e.g.*, 110 Stat. 3048, 104 P.L. 231, Sec. 1; 5 U.S.C. § 552(a)(4)(C) (requiring
22 expedited responsive pleadings within 30 days of service in FOIA actions).

23 26. Furthermore, 5 U.S.C. § 552(a)(6)(A)(i) requires that EPA provide enough information,
24 presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what
25 has not been produced and "the reasons therefore."

26 27. "[A] system adopted by an agency for dealing with documents of a particular kind
27 constitutes 'withholding' of those documents if its net effect is significantly to impair the requester's

ability to obtain the records or significantly to increase the amount of time he must wait to obtain them.” *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir.), *on reh’g sub nom. McGehee v. Cent. Intelligence Agency*, 711 F.2d 1076 (D.C. Cir. 1983). Such withholding is improper under FOIA “unless the agency can offer a reasonable explanation for its procedure.” *Id.* FOIA’s citizen suit provision allows a plaintiff to bring suit to enjoin agencies from improperly withholding agency records. 5 U.S.C. § 552(a)(4)(B).

28. There is no statutory basis for EPA to withhold a “non-responsive” portion of a record that is responsive to a FOIA request. *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review*, 830 F.3d 667, 670, 676-79 (D.C. Cir. 2016). When EPA determines that a record is responsive, it can only redact information from that record if it falls under an enumerated FOIA exception. *Id.*; *see also* The U.S. Department of Justice’s Office of Information Policy’s (OIP) 2017 FOIA guidance https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia (once a search has identified a record, the agency “must process it in its entirety for exemption applicability. Only those portions of the record that are exempt can be redacted... it is not permissible to redact information within a record as ‘non-responsive.’”).

FACTUAL BACKGROUND

EPA’s FOIA Rulemaking

29. On June 26, 2019, EPA published a final rule in the Federal Register revising EPA’s FOIA Regulations. 84 Fed. Reg. 30,028. EPA published this rule without providing the public with notice of the rule and an opportunity to comment. *Id.* at 30,028-29. EPA claimed that it did not need to provide notice and an opportunity to comment on the Regulations because EPA’s FOIA Regulations fall under the “procedural exception” and “good cause exception” to notice and comment rulemaking. *See* 84 Fed. Reg. at 30,029. EPA has provided no valid basis for this decision.

30. EPA’s FOIA Regulations purport to centralize submission and processing of FOIA requests at EPA Headquarters in Washington, D.C. 84 Fed. Reg. at 30,030, 30,031, 30,032-33. This will reduce field office involvement in FOIA request processing and will cause all FOIA requests to be processed, at least initially, at EPA Headquarters. EPA has provided no reasonable basis for this decision.

31. EPA's FOIA Regulations purport to allow the Administrator of EPA to make final FOIA determinations in the first instance. 84 Fed. Reg. at 30,031 ("the Administrator ha[s] the authority to respond to FOIA requests."); 84 Fed. Reg. at 30,033. EPA's FOIA Regulations purport to bar administrative appeals of determinations made by the Administrator. 84 Fed. Reg. at 30,035 ("An adverse determination by the Administrator on an initial request will serve as the final action of the Agency."). EPA has provided no reasonable bases for these decisions.

32. EPA's FOIA Regulations purport to set a presumptive search cut-off date for FOIA requests of the date that EPA receives the request. 84 Fed. Reg. at 30,033 ("To determine which records are within the scope of a request, an office will ordinarily include only those records in the Agency's possession as of the date the request was received by one of the methods..."). Under EPA's FOIA Regulations, EPA will ordinarily not search for records produced during the period between when it receives a request and when it actually searches for records responsive to the request. Under EPA's FOIA Regulations, EPA will ordinarily not search for records produced during the period between when it receives a request and when it actually makes a determination on the request. Under EPA's FOIA Regulations, EPA will ordinarily not search for records produced during the period between when it receives a request and when it produces records responsive to that request. EPA has provided no reasonable basis for this decision.

33. EPA's FOIA Regulations purport to allow EPA to withhold portions of records that are responsive to a FOIA request on the grounds that those portions are not responsive to the request. 84 Fed. Reg. at 30,033 (stating that various EPA staff are authorized to make final FOIA determinations "including to issue final determinations whether to release or withhold a record *or a portion of a record on the basis of responsiveness* or under one or more exemptions under the FOIA, and to issue 'no records' responses.") (emphasis added). EPA has provided no reasonable basis for this decision.

34. EPA's FOIA Regulations purport to change regulatory language addressing aggregation of certain requests. 84 Fed. Reg. at 30,037. EPA's FOIA Regulations purport to change regulatory language addressing the schedule of fees applicable to the processing of requests. 84 Fed. Reg. at 30,029, 30,030-31, 30,033, 30,035-38. EPA's FOIA Regulations purport to change regulatory language

addressing how it will provide for expedited processing of requests. 84 Fed. Reg. at 30,033, 30,034. EPA's FOIA Regulations purport to change regulatory language providing for multi-track processing. 84 Fed. Reg. at 30,034.

35. On information and belief, EPA's changes are intended to, and in fact will, prevent members of the public, including Plaintiffs and their members, from successfully submitting FOIA requests to EPA, will significantly impair requesters' ability to obtain records, will significantly increase the time it takes for requesters to receive their requested records, will further delay EPA's response to FOIA requests, will insert political interference into what should be an objective determination process, will eliminate administrative review processes provided for in FOIA, will improperly constrain the scope of FOIA productions, will cause EPA to withhold information from FOIA productions that is not within an exemption, and will otherwise interfere with FOIA's government transparency and accountability goals. However, as discussed above, the public was neither given any notice of EPA's FOIA Regulations nor an opportunity to comments on the Regulations. Both EPA's substantive decisions, memorialized in EPA's FOIA Regulations, and its decision to promulgate the Regulations without notice and comment rulemaking were unreasonable, arbitrary, capricious, not in accordance with law, and without observance of procedure required by law in violation of the APA and FOIA.

EPA's General Failure to Comply with FOIA Requirements

36. EPA's FOIA website, <https://www.epa.gov/foia>, contains data and reports documenting EPA's pattern and practice of violating FOIA's deadlines with respect to the public at large. For instance, EPA's FOIA Annual Report for fiscal year 2018 reports 2,761 backlogged requests, defined as requests pending that are beyond the statutory time period for a response. Larry F. Gottesman, *EPA FOIA Annual Report for 10/01/2017 through 9/30/2018*, <https://www.epa.gov/sites/production/files/2019-03/documents/epa-foia-annual-report-2018.pdf>. Similarly, EPA's excel spreadsheet titled "All FOIA Requests Pending as of May 31, 2018" lists thousands of overdue EPA FOIA requests. EPA, *All FOIA Requests Pending as of May 31, 2018*, <https://www.epa.gov/foia/all-foia-requests-pending-month>. The oldest of these requests had been pending at that time for an incredible 2,485 days (nearly 7 years) and dozens had been pending for 4 or

1 more years. *Id.* EPA appears to have given up on updating this list and has not provided an update in
2 over a year.

3 37. Since the inauguration of the Trump Administration, EPA has been under a hiring freeze
4 and Administrator Wheeler has been actively seeking to further shrink the Agency by recently proposing
5 to reduce its budget by an additional 31.2 percent from what it received in 2019 appropriations. Amelia
6 Brust, *Senate Dems unamused by proposed budget cuts, low staffing at EPA* (April 4, 2019),
7 [https://federalnewsnetwork.com/budget/2019/04/senate-dems-unamused-by-proposed-budget-cuts-low-](https://federalnewsnetwork.com/budget/2019/04/senate-dems-unamused-by-proposed-budget-cuts-low-staffing-at-epa/)
8 [staffing-at-epa/](https://federalnewsnetwork.com/budget/2019/04/senate-dems-unamused-by-proposed-budget-cuts-low-staffing-at-epa/). On information and belief, EPA has chosen to employ insufficient staffing to address
9 the FOIA request backlog pending before the Agency. Due to EPA's chosen insufficient staffing, the
10 backlog of FOIA requests will to continue to grow rather than to diminish in the future unless EPA
11 reverses course and assigns more staff to responding to FOIA requests and takes other actions to
12 improve its FOIA processing, including rescinding EPA's FOIA Regulations at issue in this complaint.

13 38. In addition to these more passive impediments to FOIA, EPA has also actively put
14 several practices into play to slow its FOIA responses and obstruct FOIA requester access to records.
15 For example, the U.S. House of Representatives, Committee on Oversight and Government Reform sent
16 a letter to former Administrator Scott Pruitt explaining that EPA has adopted a "first in, first out" policy
17 in order to avoid releasing records from the current administration until all Obama Administration
18 records are released. *See* Elijah E. Cummings, U.S. House of Representatives, Committee on Oversight
19 and Government Reform letter to Scott Pruitt (June 11, 2018)
20 [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf)
21 [11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf). This Letter explained that EPA also
22 instituted a new process requiring senior political appointees to review FOIA responses before they are
23 released, a so-called "awareness review." *Id.* The letter explained "EPA's front office is now responding
24 more slowly, withholding more information, and rejecting more requests, according to EPA's own data
25 and independent sources. Combined with [EPA's] refusal to produce documents requested by Congress,
26 [EPA's] actions in delaying records under FOIA raise concerns about a fundamental lack of
27 transparency at EPA." *Id.* A more recent December 19, 2018 letter to Administrator Wheeler from the

Committee on Oversight and Government Reform indicates these concerns appear to be continuing under Administrator Wheeler and that even Congress is unable to get EPA to produce records on time. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2018-12-19.EEC%20to%20Wheeler-EPA%20re%20Pruitt.pdf> (requesting, on December 19, 2018, access to records it had requested on February 20, 2018, April 11, 2018, and April 13, 2018).

39. On information and belief, EPA's procedures have the purpose and effect of slowing FOIA releases and of impairing FOIA requesters' ability to receive the records that they seek. EPA's FOIA Regulations exacerbate these problems by expressly providing for the centralization of FOIA response exemplified by the "awareness review" that has been a major factor in slowing EPA's FOIA responses.

EPA Staff Have Recently Pointed Out the Flaws in the Policies

EPA Adopted in its FOIA Regulations

40. EPA staff have spoken out against the very changes laid out in EPA's FOIA Regulations. EPA's own internal audit of its FOIA program in 2016 found that career staff strongly preferred improving centralization of FOIA processes *within regions themselves* (42%) over attempting to centralize FOIA at EPA headquarters (23%). *See* EPA, Office of Environmental Information. *Evaluation of EPA's FOIA*. <https://www.epa.gov/sites/production/files/2016-12/documents/evaluation-foia-program-2-12-2016.pdf>. Those same career staff also expressed concern that EPA lacked the resources or staff actually necessary to support any successful centralization effort. *Id.* These facts, coupled with EPA's overwhelming failure to comply with FOIA deadlines, render the decision to centralize FOIA response operations in Washington, D.C. unreasonable, arbitrary, and capricious.

41. The aforementioned "awareness review" policy, which began under former Administrator Scott Pruitt, authorized political, not career, staff to issue FOIA determinations and overrule career FOIA staff and required political staff to approve EPA's FOIA responses. Letter from Ranking Member Elijah E. Cummings (now Chairman) of the House Oversight Committee, to former EPA Administrator Scott Pruitt. June 11, 2018.

<https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06->

11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf. EPA Chief of Staff Ryan Jackson admitted that this review process was used for requests EPA considered “politically charged.” Subpoena Request from Ranking Member Cummings to Committee Chairman Trey Gowdy. July 13, 2018. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-07-13.EEC%20to%20Gowdy%20re.FOIA%20Subpoena.pdf>. However, on November 16, 2018, Mr. Jackson subsequently issued a memorandum stating that “awareness” reviewers are not permitted to issue or alter FOIA determinations made by career staff, and that only “FOIA staff, program staff, and program managers will . . . determine whether information should be released or withheld under FOIA’s exemptions.” Memorandum from Ryan Jackson, EPA Chief of Staff, to all EPA staff re: Awareness Notification Process for Select Freedom of Information Act Releases. November 16, 2018. <http://www.environmentalintegrity.org/wpcontent/uploads/2018/11/epa-memo.pdf>. EPA’s FOIA Regulations are an about face on this policy in that they purport to allow political appointees, including the Administrator, to determine what records should be released and withheld in the first instance. *See* 84 Fed. Reg. at 30,031, 30,033. Adopting regulations which mandate change in this policy is significant and mandates public notice and comment procedures which EPA has failed to implement.

Plaintiffs’ Past and Pending Lawsuits Challenging EPA’s Ongoing Failures to Comply with FOIA

42. EcoRights and OCE have a long history of submitting FOIA requests to EPA. This includes several FOIA requests that EcoRights submitted over the last two and a half years requesting records related to various scandals and attempts at limiting transparency at EPA. When EPA failed to comply with FOIA’s statutory requirements with regard to these requests, EcoRights was forced to seek judicial intervention to secure its rights guaranteed by FOIA.

43. EcoRights sent EPA a FOIA request on February 1, 2017, seeking records addressing “gag order” directives or requests issued since the inauguration of President Trump by any Trump Administration official to employees of the EPA instructing them to not speak publicly about work at EPA and concerning whether scientific data must undergo review by a political appointee prior to publication by EPA (“FOIA Request 1”). EPA failed to issue a final determination concerning FOIA Request 1 within the deadlines mandated by FOIA or to promptly produce any records responsive to this

request. EcoRights filed a lawsuit in this Court challenging EPA's failure to comply with FOIA with regards to FOIA Request 1 on January 18, 2018. *Ecological Rights Found. v. EPA*, 4:18-cv-00394-DMR (N.D. Cal.), Dkt. 1 ("*EcoRights v. EPA I*").

44. On August 6, 2018, EcoRights amended its complaint in *EcoRights v. EPA I* to add claims related to three additional EcoRights FOIA requests that EPA had failed to timely process. *Id.* at Dkt. 37. EcoRights submitted the second FOIA request ("FOIA Request 2") on January 23, 2018. FOIA Request 2 seeks records related to EPA's efforts to investigate employees for expressing political views different than those of the Trump Administration, including EPA's contracts and communications with outside entities to effectuate this purpose. EcoRights submitted the third FOIA request ("FOIA Request 3") on March 21, 2018. FOIA Request 3 seeks records related to EPA's use of drug testing to intimidate employees and records related to EPA's hiring freeze, reductions in staffing, and plans to curtail environmental programs to accommodate the decrease in staff. EcoRights submitted the fourth FOIA request ("FOIA Request 4") on April 10, 2018. FOIA Request 4 seeks records related to former EPA Administrator Pruitt's use of a condominium connected with an industry lobbyist and communications with that lobbyist; records reflecting former Administrator Pruitt's role in hiring, demoting, and securing pay raises for certain employees within EPA; former Administrator Pruitt's use of public funds for first class airfare and security measures, and records related to former Administrator Pruitt's travel expenditures.

45. On August 30, 2018, EcoRights sent EPA a FOIA request for records addressing a variety of transparency and related issues at EPA ("FOIA Request 5"). FOIA Request 5 seeks transition memoranda issued since former Administrator Pruitt resigned from the EPA on July 5, 2018, relating to efforts to curtail transparency at EPA, acceptable travel and housing costs and practices for EPA employees, complaints of retaliatory reassignments and demotions within EPA, and complaints about improper promotions at EPA. FOIA Request 5 also seeks records related to Administrator Andrew Wheeler's plans for the soundproof phone booth former Administrator Pruitt installed in his office, to continue former Administrator Pruitt's attempts to shrink the EPA and institute a "hiring freeze" at EPA, to change policies concerning how to review and/or respond to FOIA requests; and his calendar, meeting

1 schedule, and meeting notes. Finally, FOIA Request 5 seeks records related to the EPA Inspector
 2 General's ongoing ethics investigations of former Administrator Pruitt and records related to the
 3 sufficiency of EPA's search for records responsive to FOIA Request 1. EPA failed to timely issue a
 4 determination on FOIA Request 5 or to produce the responsive records and EcoRights filed a lawsuit
 5 challenging EPA's failure to comply with FOIA with regards to FOIA Request 5 request on April 5,
 6 2019. *Ecological Rights Found. v. EPA*, 1:19-cv-980-BAH (D.D.C.) ("*EcoRights v. EPA I*"). EcoRights
 7 Amended its complaint in *EcoRights v. EPA II* on April 12, 2019, to, amongst other things, add a claim
 8 that EPA's repeated failures to comply with FOIA with regards to EcoRights' FOIA requests constitutes
 9 a pattern or practice of violating FOIA.

10 46. As of the filing of this Complaint, EPA has not made complete final determinations on
 11 FOIA Request 1, FOIA Request 2, FOIA Request 3, FOIA Request 4, or FOIA Request 5 despite the
 12 statutory response deadlines having expired long ago and the requests being subject to litigation. This
 13 has prevented EcoRights from serving as an effective public interest watchdog, from preventing
 14 environmental harm, and from participating in time-limited opportunities for political involvement and
 15 has denied EcoRights records it is entitled to have by law. EPA has been violating FOIA with impunity
 16 and the new EPA FOIA Regulations continue and compound EPA's attack on transparency and
 17 accountability.

18 **FIRST CLAIM FOR RELIEF**

19 **Violation of the APA and FOIA**

20 **EPA's Decision to Centralize its FOIA Processing Activities at 21 EPA Headquarters is Unreasonable, Arbitrary, and Capricious**

22 47. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and
 all paragraphs of this Complaint.

23 48. EPA's decision to centralize its FOIA processing activities at its Washington, D.C.
 24 Headquarters is unreasonable, arbitrary, and capricious in light of its overwhelming failure to timely
 25 process FOIA requests and the fact that this will inevitably slow that process down further. 5 U.S.C. §
 26 552(a)(6)(A)(i) is plain: within 20 working days of the date that a FOIA request is received federal
 27 agencies must provide a determination that (1) informs the requester as to the disposition of its request,

i.e., whether records will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal any decision not to provide requested records. EPA nearly always misses that deadline. However, contrary to its own staff's recommendations, EPA has decided to centralize processing of FOIA requests, reducing the number of staff working on those requests and inevitably causing further delay.

49. Under the APA, "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). EPA's decision to centralize FOIA processing at its headquarters is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* This decision also represents an improper withholding of records under FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee*, 697 F.2d at 1110.

SECOND CLAIM FOR RELIEF

Violation of the APA and FOIA

EPA's Decision to Allow the EPA Administrator to Make Initial FOIA Determinations and to Bar Appeals of Those Determinations is Unreasonable, Arbitrary, Capricious, and Otherwise Not in Accordance With Law

50. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

51. EPA's decision to allow the Administrator to make initial determinations on FOIA requests and to bar requesters from appealing those determinations is arbitrary, capricious, and otherwise not in accordance with law. FOIA requires that all determinations provide notification of "the right of such person to appeal to the head of the agency..." 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa). The right of a FOIA requester to appeal a FOIA determination to the head of the agency, here the EPA Administrator, is thus statutorily required for a valid determination under FOIA. EPA may not foreclose the opportunity to appeal any determination. The Administrator also cannot make an initial determination because he or she is the official charged with deciding the appeal. EPA's decision to allow the Administrator to make initial determinations that are not appealable violates the language and structure of FOIA.

52. Under the APA, “[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). EPA’s decision to allow the Administrator to make initial FOIA determinations that are not appealable is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* This decision also represents an improper withholding of records under FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee*, 697 F.2d at 1110.

THIRD CLAIM FOR RELIEF

Violation of the APA and FOIA

EPA’s Decision to Use a Date-of-Request Cut-Off for Processing FOIA Requests is Unreasonable, Arbitrary, and Capricious

53. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

54. EPA’s decision to use the date of a FOIA request as the presumptive cut-off date for the search for records responsive to that request is unreasonable, arbitrary, and capricious. EPA nearly always misses its deadline to issue a determination on FOIA requests, sometimes by many years. This means that EPA will use a search cut-off date for requests that may be years in the past, providing requesters with stale information. This does not comport with FOIA’s information forcing goals and language. Given EPA’s extremely poor records of responding to FOIA requests in a timely manner, its presumption of a date-of-request search cut-off date for FOIA requests is unreasonable.

55. Under the APA, “[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). EPA’s decision to use the date of a FOIA request as the presumptive cut-off date for the search for records responsive to that request is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* This decision also represents an improper withholding of records under FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee*, 697 F.2d at 1110.

FOURTH CLAIM FOR RELIEF**Violation of the APA and FOIA****EPA’s Decision Purporting to Allow it to Withhold Portions of Records on “Responsiveness” Grounds is Unreasonable, Arbitrary, Capricious, and Otherwise Not in Accordance With Law**

56. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

57. EPA’s FOIA Regulations purporting to allow it to withhold portions of responsive records on the basis that those portions of the records are themselves non-responsive to the FOIA request is unreasonable, arbitrary, capricious, and otherwise not in accordance with law. If a record contains information that is responsive to a FOIA request, it must be produced in its entirety unless a portion can properly be withheld under one of FOIA’s nine enumerated exemptions. *Am. Immigration Lawyers*, 830 F.3d at 670, 676-79. An agency cannot withhold a portion of a record by claiming that portion is not responsive to the request. *Id.* However, that is precisely what EPA’s FOIA Regulations say EPA is allowed to do. 84 Fed. Reg. at 30,033 (providing in new 40 C.F.R. § 2.103(b) that the listed officials “are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A), including to issue final determinations whether to release or withhold a record *or a portion of a record on the basis of responsiveness...*”) (emphasis added).

58. Under the APA, “[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). EPA’s decision to allow officials to withhold portions of responsive records on the basis of “responsiveness” is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* This decision also represents an improper withholding of records under FOIA. *See* 5 U.S.C. § 552(a)(4)(B); *McGehee*, 697 F.2d at 1110.

FIFTH CLAIM FOR RELIEF**Violation of the APA and FOIA****EPA’s Promulgation of the EPA FOIA Regulations Without Notice and Comment Rulemaking is Without Observance of Procedure Required by Law**

59. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

60. EPA promulgated the EPA FOIA Regulations without notice and comment rulemaking despite being required to use notice and comment rulemaking by both the APA and FOIA. EPA claimed that it did not need to provide notice and an opportunity to comment on the Regulations because EPA's FOIA Regulations fall under the "procedural exception" and "good cause exception" to notice and comment rulemaking. *See* 84 Fed. Reg. at 30,029. However, these narrow exceptions do not apply where notice and comment rulemaking is required by another statute. 5 U.S.C. § 553(b)(3). Because FOIA independently requires notice and comment rulemaking for regulations addressing aggregation of certain requests, addressing the schedule of fees applicable to the processing of requests, providing for expedited processing of requests, and providing for multi-track processing of requests, all of which were addressed in EPA's FOIA Rulemaking, these exceptions cannot apply to excuse EPA from complying with the APA's notice and comment requirements. *See id.*; 5 U.S.C. § 552(a)(6)(B)(iv) (aggregation); 5 U.S.C. § 552(a)(4)(A)(i) (schedule of fees); 5 U.S.C. § 552(a)(6)(E)(i) (expedited processing); 5 U.S.C. § 552(a)(6)(D)(i) (multi-track processing). These provisions of FOIA also constitute independent legal duties to conduct notice and comment rulemaking that EPA failed to follow when it promulgated EPA's FOIA Regulations. In addition, the good cause exemption does not apply because EPA's FOIA Rulemaking is not "a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks*, 682 F.3d at 94. Indeed, the public, including EcoRights, is "greatly interested" in how EPA manages its FOIA compliance. *Id.* The procedural exception also does not apply because EPA's FOIA Rulemaking contains multiple explicit and implicit "value judgments," making application of that exception inappropriate. *Chao*, 587 F. Supp. 2d at 100-01.

61. Under the APA "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law." 5 U.S.C. § 706(2)(D). EPA's decision to promulgate EPA's FOIA Regulations without notice and comment rulemaking was "without observance of procedure required by law." *Id.*

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek the following relief:

- A. Enter findings and declare that EPA's decision to centralize FOIA processing at EPA Headquarters violated the APA and FOIA;
- B. Enter findings and declare that EPA's decision to allow the EPA Administrator to make FOIA determinations violated the APA and FOIA;
- C. Enter findings and declare that EPA's decision to exempt FOIA determinations made by the EPA Administrator from the FOIA appeals process violated the APA and FOIA;
- D. Enter findings and declare that EPA's decision to use the date it receives a FOIA request as the presumptive search date cut-off for processing FOIA requests violated the APA and FOIA;
- E. Enter findings and declare that EPA's decision to allow itself to redact portions of responsive records based on its determination that those portions themselves are not responsive to the FOIA request violated the APA and FOIA;
- F. Enter findings and declare that EPA's decision to promulgate EPA's FOIA Regulations without notice and comment rulemaking violated the APA and FOIA;
- G. Vacate EPA's FOIA Regulations;
- H. Remand this matter to EPA for further proceeding consistent with this Court's order;
- I. Enjoin EPA from relying on EPA's FOIA Regulations;
- J. Direct by order that EPA promulgate new FOIA regulations, if any, by first providing a proposed rule followed by at least a 30-day public comment period before adopting a final rule;
- K. Grant Plaintiffs' costs of litigation, including reasonable attorney fees, as provided by FOIA, 5 U.S.C. § 552(a)(4)(E), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and
- L. Issue any other relief, including injunctive relief, which this Court deems necessary, just, or proper or relief that Plaintiffs may subsequently request.

DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Based on Plaintiffs' knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned certifies that, as of this date, other than the named parties, there is no such interest to report.

Dated: July 24, 2019

Respectfully submitted,

By:

Christopher A. Sproul

Christopher Sproul
Counsel for Ecological Rights Foundation and
Our Children's Earth Foundation

Message

From: Alex Guillen [aguillen@politico.com]
Sent: 7/24/2019 5:00:11 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Press [Press@epa.gov]
Subject: RE: Comment on FOIA lawsuit

Yes, and will note them.

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 24, 2019 12:58 PM
To: Alex Guillen <aguillen@politico.com>; Press <Press@epa.gov>
Subject: RE: Comment on FOIA lawsuit

EPA doesn't comment on pending litigation. I assume you have some of our other statements on our rule as well?

From: Alex Guillen <aguillen@politico.com>
Sent: Wednesday, July 24, 2019 12:53 PM
To: Press <Press@epa.gov>
Subject: Comment on FOIA lawsuit

Hello,

Does EPA have any comment on the lawsuit filed today by the Center for Biological Diversity and EIP over the agency's recent FOIA regulation? A copy is attached.

Thank you,

Alex Guillen | Energy Reporter | **POLITICOPRO**
1000 Wilson Boulevard, 8th Floor | Arlington, VA 22209
Phone: 703.341.4619
Email: aguillen@politico.com | Twitter: [@alexaguillen](https://twitter.com/alexaguillen) | Website: www.POLITICOPRO.com

Message

From: Kevin Bogardus [kbogardus@eenews.net]
Sent: 7/24/2019 2:58:46 PM
To: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Abboud, Michael [abboud.michael@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]; Press [Press@epa.gov]
Subject: Litigation and legislation against EPA's FOIA reg
Attachments: EPA FOIA Reg CREW Lawsuit.pdf

Hey everyone,

It's Kevin Bogardus with E&E News.

I'm working on a story about EPA's new Freedom of Information Act regulation, which has already sparked legislation and litigation. I noticed that Citizens for Responsibility and Ethics in Washington has filed a lawsuit against this regulation, which I plan to link and quote from in my story (please see attached). In addition, Republican and Democratic senators have introduced legislation targeting the regulation (https://www.eenews.net/assets/2019/07/24/document_gw_01.pdf). I had a few questions about this, which are:

-- What is EPA's reaction to litigation against its new FOIA regulation?

-- What is EPA's reaction to legislation that takes issue with "the basis of responsiveness" language in its new FOIA regulation?

Please get back to me as soon as possible. My deadline is noon EST today but the sooner you get back to me, the more it helps my reporting. Also, since I'm working from home today, please email me here or call my cell phone at 202-247-7844. Thank you for your help.

Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

Ex. 6 Personal Privacy (PP) (C)

202-737-5299 (f)

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environmentalintegrity.org

July 9, 2019

Sent via certified mail and electronic mail

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20640
wheeler.andrew@epa.gov

Re: Concerns Over EPA's "FOIA Regulations Update" Final Rule

Dear Administrator Wheeler,

The Environmental Integrity Project, Center for Biological Diversity, Chesapeake Bay Foundation, Earthjustice, Environmental Defense Center, Environmental Defense Fund, Essential Information, Food & Water Watch, Friends of the Earth, the Harvard Law School Emmet Environmental Law and Policy Clinic, Natural Resources Defense Council, Northwest Environmental Advocates, Our Children's Earth Foundation, Sierra Club, Southern Environmental Law Center, and Union of Concerned Scientists, (collectively, "Public Interest Groups"), respectfully write to express their strong concerns regarding the "FOIA Regulations Update" final rule promulgated by the Agency, without notice or an opportunity for public comment, on June 26, 2019 (the "Rule").¹

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."² Because "disclosure, not secrecy, is the dominant objective" of FOIA, it embodies a "philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language," and explicitly "seeks to permit access to official information long shielded unnecessarily from public view" and "to create a judicially enforceable right to secure such information from possibly unwilling official hands."³

Public Interest Groups are all non-profit organizations with a longstanding and continuing reliance on FOIA – both on their own behalf and/or on behalf of their members, clients, or partners – and are concerned that this new Rule will unduly impair the public's right and ability to apprise itself of important agency actions. While this letter summarizes some of our key substantive concerns regarding the new Rule, it is not an exhaustive list. We strongly

¹ 84 Fed. Reg. 30,028 (June 26, 2019).

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ *U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

urge EPA to delay implementation of the Rule until the Agency has conducted a sufficient period of notice and comment, in accordance with the requirements of the Administrative Procedure Act (“APA”). In brief, this letter addresses concerns with (i) the Rule’s inappropriate authorization of political appointees to issue FOIA determinations; (ii) the Rule’s requirement that all FOIA requests be submitted to, and reviewed by, EPA Headquarters; (iii) the Rule’s apparent authorization of a new basis for withholding records based on their “responsiveness,” which contradicts both FOIA and judicial precedent; and (iv) the lack of public notice and comment as required by the APA. These aspects of the Rule contravene not only the requirements of FOIA and the APA, but also the fundamental purpose of FOIA to ensure an informed public and transparency in government.

The Rule inappropriately authorizes political appointees to make FOIA determinations and significantly increases the potential for abuse of the FOIA process.

Any politicization of FOIA undermines its core functions of enabling the public to inform itself on what its government is up to, and to hold officials accountable for those actions. This is precisely why prior administrations, from both sides of the aisle, have historically taken pains to partition political appointees from FOIA processes. Under the Obama administration, political appointees at EPA were rarely involved in the FOIA response process at all, and participated only when they themselves had responsive records to provide.⁴ Under former Administrator Scott Pruitt, EPA departed sharply from this longstanding bipartisan practice in implementing a “political awareness review” policy, under which political staff were not only authorized to issue FOIA determinations and overrule career FOIA staff, but were required to approve all FOIA requests.⁵ In an interview with the House Oversight Committee, Chief of Staff Ryan Jackson indicated political staff had applied this review process to FOIA requests they deemed “politically charged.”⁶

On November 16, 2018, Mr. Jackson issued an agency-wide Awareness Notification Process memorandum which explicitly superseded this political awareness review process.⁷ The memo specifically stated that awareness review is “not an approval process,” that reviewers are not permitted to issue or alter FOIA determinations made by career staff, and that only “FOIA staff, program staff, and program managers will . . . determine whether information should be

⁴ U.S. EPA Office of Inspector General. *Report No. 15-N-0261: Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act*. August 20, 2015. <https://www.epa.gov/sites/production/files/2015-09/documents/20150820-15-p-0261.pdf>

⁵ Letter from Ranking Member Elijah E. Cummings (now Chairman) of the House Oversight Committee, to former EPA Administrator Scott Pruitt. June 11, 2018. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf>

⁶ Subpoena Request from Ranking Member Cummings to Committee Chairman Trey Gowdy. July 13, 2018. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-07-13.EEC%20to%20Gowdy%20re.FOIA%20Subpoena.pdf>

⁷ Memorandum from Ryan Jackson, EPA Chief of Staff, to all EPA staff re: Awareness Notification Process for Select Freedom of Information Act Releases. November 16, 2018. <http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf>

released or withheld under FOIA’s exemptions.”⁸ Political appointees were notably not identified as part of EPA’s usual FOIA process in Mr. Jackson’s memorandum.

EPA’s new Rule, however, *explicitly* authorizes political appointees – including (but not limited to) yourself, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, and Deputy Regional Administrators, and any of “those individuals’ delegates” – to make FOIA determinations. 40 C.F.R. § 2.103(b). The Rule effectively permits political appointees – including EPA Administrators – to circumvent the awareness notification process entirely by assuming the direct authority to deny FOIA requests themselves. Since the purported purpose of the November 2018 memorandum and the procedures it espouses was to insulate EPA’s FOIA review from precisely this kind of interference, it is difficult to see how these policies can be reconciled, or how the new Rule can be seen as “promoting transparency and building public trust” in the Agency’s FOIA process. To the contrary, because recent FOIAs by Public Interest Groups and others have revealed numerous embarrassing and even career-ending scandals for former Administrator Pruitt and others, EPA’s changes to 40 C.F.R. § 2.103(b) suggest that EPA is attempting to limit transparency and grant more control over records to political staff in response – a suspicion necessarily bolstered by EPA’s failure to allow any opportunity for public comment.

While the new Rule’s explicit grant of FOIA authority to political appointees is concerning enough, EPA’s deliberate omission of any appreciable limitations regarding who may be “delegated FOIA decision making authority” compounds the potential for abuse of the FOIA process by political appointees. The Agency’s conclusion that “it is not necessary to set forth such delegations, and limitations, in Agency regulations,” is especially puzzling as the Agency explicitly states that it was necessary to revise § 2.103(b) in the first place “because the term ‘division director’ is not easily interpreted across the Agency.”⁹ If the term “division director” was so inscrutable to Agency staff as to require an explicitly codified definition, surely the term “division director’s designee” merits a similarly explicit clarification. It is difficult to see how the Rule’s express authorization of political appointees to not only make FOIA determinations, but to also delegate that authority to *anyone*, including other political appointees, can meaningfully insulate the FOIA process from potential abuse. Public Interest Groups respectfully submit that such an intentionally ill-defined delegation loophole all but ensures that the question is not whether the FOIA process will be abused, but only how pervasive such future abuses will be.

**Requiring all FOIA requests to be submitted to, and reviewed by,
EPA Headquarters increases the potential for political abuse of the FOIA process.**

The potential for political staff to abuse the FOIA process is only exacerbated by the Rule’s substantial revision of 40 C.F.R. § 2.101(a) *requiring* all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. – the precise office where the majority of political appointees are located. Aside from this requirement intuitively granting political staff

⁸ *Id.*

⁹ *See* 84 Fed. Reg. at 30,031.

heightened opportunities to interfere with FOIA requests, it is difficult to see how this change could possibly improve the Agency's FOIA efficiency or enhance the public's lawful access to information. EPA's own internal audit of its FOIA program in 2016, which included agency-wide interviews and surveys of hundreds of career FOIA staff, found that career staff strongly preferred improving centralization of FOIA processes within regions themselves, over attempting to centralize FOIA at EPA HQ.¹⁰ Those same career staff also expressed wide concern that the Agency lacked the resources or staff actually necessary to support any successful centralization effort. As EPA has been experiencing pervasive issues meeting its FOIA obligations in the past two years as it is, and has frequently invoked a lack of resources and staff to justify its delays in processing FOIA requests, the wisdom of adding these additional procedural hurdles – which are neither necessary nor recommended by EPA's own FOIA staff – is highly questionable. Indeed, the new rules seem all but certain to both encourage inappropriate political interference and create unnecessary bottlenecks.

**The FOIA does not permit agencies to withhold records,
or portions of records, based on a determination of “non-responsiveness.”**

The Rule attempts to extend the Agency's ability to withhold records beyond the nine exemptions enumerated under FOIA. More specifically, the Rule revises 40 C.F.R. § 2.103(b) to impermissibly allow authorized individuals to “issue final determinations whether *to release or withhold a record or a portion of a record on the basis of responsiveness* or under one or more exemptions under the FOIA, and to issue ‘no records’ responses.” (emphasis added). The addition of this new language is troubling because § 2.104(h), which requires the Agency to notify the requester of any “adverse determination” under FOIA and provide the requester an opportunity to challenge said determination, expressly does *not* include determinations to “release or withhold a record or a portion of a record on the basis of responsiveness” within the definition of “adverse determinations.”

As the D.C. Circuit has explicitly (and recently) held, the law is clear that FOIA does not permit agencies to withhold a record or a portion of a record “on the basis of responsiveness.”¹¹ Once an agency has identified a record within the scope of a search, it must determine whether it falls under any of FOIA's enumerated exemptions, and promptly inform the requester of the basis for its determination. The U.S. Department of Justice's Office of Information Policy (OIP) FOIA guidance as far back as 1995 not only strongly discouraged agencies from asserting any determinations of “non-responsiveness” in the first place, but also stated that in any instance in which a requester disagrees, “the document pages involved should be included without question by the agency.”¹² The 1995 guidance also states that in all cases, at a minimum requesters *must* be informed of, and given an adequate opportunity to challenge, any determinations that a record or portion of a record is “non-responsive.” As the 1995 guidance indicates, even prior to *Am.*

¹⁰ See U.S. EPA, Office of Environmental Information. *Evaluation of EPA's FOIA Program: Final Report*. February 12, 2016. <https://www.epa.gov/sites/production/files/2016-12/documents/evaluation-foia-program-2-12-2016.pdf>

¹¹ *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016).

¹² U.S. DOJ. *OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update*, Vol. XVI, No. 3 (1995), at page 2-4.

Immigration Lawyers, “non-responsiveness” determinations were heavily disfavored by DOJ. After *Am. Immigration Lawyers*, OIP revised its 2017 FOIA guidance accordingly to explicitly clarify that “it is not permissible to redact information within a record as ‘non-responsive,’” and that once an agency’s search has identified a record, the agency “must process it in its entirety for exemption applicability. Only those portions of the record that are exempt can be redacted.”¹³

In press releases following the Rule’s issuance, EPA has stated that the Rule does not authorize any agency action which would contradict the judicial precedent and DOJ’s longstanding interpretation of FOIA’s requirements described above.¹⁴ However, the plain text of the Rule’s revised § 2.103(b), which states that the Agency may “issue final determinations whether *to release or withhold a record or a portion of a record on the basis of responsiveness*,” contradicts both. (emphasis added). If the Agency’s position is that § 2.103(b) cannot actually permit the Agency to make these determinations, it is unclear why the Agency amended § 2.103(b) to explicitly add this language. In order to ensure consistency and prevent unnecessary confusion regarding the Rule, Public Interest Groups respectfully request that EPA revise the Rule to either remove this language from § 2.103(b), or amend § 2.104(h) to explicitly include any “responsiveness” determinations within the definition of “adverse determinations.”

**The Rule should have been issued with appropriate notice and comment
as required by the Administrative Procedure Act.**

We strongly disagree with EPA’s assertion that public discussion of this rulemaking is “impracticable, unnecessary, or contrary to the public interest,” as well as EPA’s characterization of this Rule as making “minor and purely ministerial changes” within the scope of the procedural exemption.¹⁵ These changes are patently substantial, and EPA cannot validly claim that requiring all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. is a mere “procedural” rule exempt from notice and comment. EPA’s invocation of the “good cause” exemption, which is “narrowly construed and only reluctantly countenanced,”¹⁶ on the grounds that “the agency lacks discretion to reach a different outcome in response to comment” is similarly befuddling. The 2016 FOIA Amendments require only that agencies periodically review and update their FOIA regulations. They certainly do not mandate many of the changes actually made by this Rule.

Notice and comment requirements serve two equally important purposes. The first is to ensure that citizens have a meaningful opportunity to provide input and objections regarding substantive agency rules that could affect the public – which this Rule plainly does. Second, and equally important, is to ensure that an agency has actually considered all relevant factors and concerns before acting, and is issuing its rules in a deliberative manner. EPA’s circumvention of these normal procedures fundamentally fails to serve either purpose, and clarifying the effect and scope of a rule through intermittent press releases – as EPA is currently doing – is precisely the

¹³ <https://www.justice.gov/oip/oip-guidance/defining-a-record-under-the-foia>

¹⁴ <https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

¹⁵ 84 Fed. Reg. at 30,029.

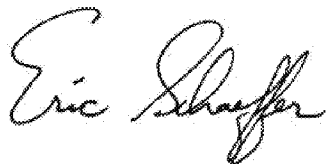
¹⁶ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

sort of haphazard implementation and inconsistent, confusing guidance that notice and comment procedures are intended to prevent.

As you are aware, EPA's FOIA response and compliance rates have declined substantially in the past few years, which has significantly damaged the public's trust in the Agency and resulted in multiple Congressional inquiries regarding EPA's FOIA program.¹⁷ Regardless of the Agency's views on the matter, it is clear that wide portions of the public, as well as members of Congress, have significant concerns that this new Rule will only serve to make that program even more cumbersome, and ultimately make it more difficult for the public to obtain the information that is its right by law. As you yourself emphasized in a November 13, 2018 memo to all EPA staff, FOIA "is both a statutory obligation and an important tool for promoting transparency and building public trust in agency actions."¹⁸ Yet EPA's circumvention of the notice and comment process not only further undermines the public's faith in the integrity of EPA's FOIA procedures, but raises significant doubts as to whether EPA has proceeded with due care and consideration, as all agencies should prior to taking substantive actions.

We respectfully call on EPA to withdraw this illegally adopted Rule and remove the Rule's impermissible provisions. EPA should only move forward with a revised Rule if it contains revisions that would actually improve the FOIA process, and the Agency must submit any revised Rule for appropriate notice and comment procedures, in order to ensure that both public and the Agency have an opportunity to meaningfully evaluate its contents. To do otherwise would contravene not only the APA, but basic tenets of good governance, rational decision-making, and your stated commitment to transparency and re-establishing the public trust in EPA's actions.

Sincerely,



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eschaeffer@environmentalintegrity.org

Margaret E. Townsend, Attorney
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Lisa Feldt, Vice President for Environmental
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Chesapeake Bay Foundation, Inc.
(410) 268-8816
LFeldt@cbf.org

¹⁷ June 11, 2018 Letter from Cummings to former Administrator Pruitt, *supra* note 3.

¹⁸ November 16, 2018 Awareness Notification Process Memo, *supra* note 5.

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Kym Hunter, Senior Attorney
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Andrew Rosenberg, Director of the Center for
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Union of Concerned Scientists
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Cambridge, MA 02138
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arosenberg@ucsusa.org

cc (via electronic mail only):

Wendy Blake, Associate General Counsel
General Law Office, Office of General Counsel
U.S. Environmental Protection Agency
blake.wendy@epa.gov

Tim Epp, Acting Director
National FOIA Office
U.S. Environmental Protection Agency
epp.timothy@Epa.gov

Denise Walker, Acting Assistant General Counsel
National FOIA Office
U.S. Environmental Protection Agency
walker.denise@epa.gov

Message

From: Grantham, Nancy [Grantham.Nancy@epa.gov]
Sent: 7/10/2019 3:49:42 PM
To: Abboud, Michael [abboud.michael@epa.gov]
CC: Abboud, Michael [abboud.michael@epa.gov]; Press [Press@epa.gov]
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

Ex. 5 Deliberative Process (DP) thanks ng

From: Abboud, Michael
Sent: Wednesday, July 10, 2019 11:49 AM
To: Kevin Bogardus <kbogardus@eenews.net>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Press <Press@epa.gov>
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

I refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>

<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 10, 2019 11:45 AM
To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
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Hey everyone, I just wanted to check in one last time before my deadline of noon EST today. Any thoughts on the below? Please let me know. Thanks again for your help.

-Kevin

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 10, 2019 8:50 AM
To: schiermeyer.corry@epa.gov; abboud.michael@epa.gov; Press <Press@epa.gov>
Subject: Re: Journalism and environmental groups urge EPA to delay FOIA regulation

Hey guys, Kevin Bogardus with E&E News here, checking in this morning as promised. Any thoughts on the below? Please let me know before my deadline of noon EST today. Thanks for your help.

-Kevin

Sent from my iPhone

On Jul 9, 2019, at 8:21 PM, Kevin Bogardus <kbogardus@eenews.net> wrote:

Hey everyone,

It's Kevin Bogardus with E&E News. My apologies for the evening email. I will check in again tomorrow morning.

I'm working on a story about journalism and environmental groups urging EPA to delay its new Freedom of Information Act regulations. I had a few questions about this, which are:

-- In letters sent yesterday to EPA, both journalism groups (please see <https://www.rcfp.org/wp-content/uploads/2019/07/7-9-19-News-Media-Coalition-Letter-to-EPA-re-FOIA-Reg-Amendments.pdf>) and environmental groups (please see attached) urged EPA to delay implementation of its new FOIA regulation and open it up for a public comment period. Does EPA plan to delay implementation of its new FOIA regulation and/or open it up for a public comment period? Why or why not?

-- The Society of Environmental Journalists also responded to EPA's letter last week in a separate letter yesterday (<https://www.sej.org/sites/default/files/packard-epp-sej-letter07092019.pdf>). Does EPA have any response to this latest SEJ letter?

Please get back to me as soon as possible. My deadline is noon EST Wednesday, July 10, but the sooner you get back to me, the more it helps my reporting. Thank you for your help.

Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

Ex. 6 Personal Privacy (PP) (C)

202-737-5299 (f)

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EnergyWire, ClimateWire, E&E Daily, Greenwire, E&ENews PM, E&ETV

<2019.07.09 Letter from Orgs to EPA re FOIA Regulations Update Rule FINAL-1.pdf>

Message

From: Glenn, William [Glenn.William@epa.gov]
Sent: 7/24/2019 4:39:51 PM
To: Wells, Porter [pwells@bloomberglaw.com]
CC: Press [Press@epa.gov]
Subject: RE: Bloomberg Law Media Req: Ecological Rights Found. v. EPA (N.D. Cal., complaint filed 7/24)

Hi Porter,

Thanks for contacting us. I'm forwarding your inquiry to our press office in Washington, in case you haven't already reached out to them.

Cheers,

Bill

Bill Glenn
Acting Director
Office of Public Affairs
U.S. EPA, Pacific Southwest
glenn.william@epa.gov / (415) 947-4254

From: Wells, Porter <pwells@bloomberglaw.com>
Sent: Wednesday, July 24, 2019 7:57 AM
To: Glenn, William <Glenn.William@epa.gov>
Subject: Bloomberg Law Media Req: Ecological Rights Found. v. EPA (N.D. Cal., complaint filed 7/24)

Hello,

I'm a litigation reporter with Bloomberg Law. I saw that a new lawsuit has been filed against the US EPA challenging the new FOIA Rule as arbitrary and capricious and am writing a short story on the complaint today. The Ecological Rights Foundation claims the new rule allows too much political interference into the FOIA process and was passed through the rulemaking process through the use of the improper procedural exemptions.

The complaint can be read here:

http://www.bloomberglaw.com/public/document/EcologicalRightsFoundationetalvEnvironmentalProtectionAgencyDocke?doc_id=X1Q603VC4TO2

If the EPA has any comment on the allegations in the lawsuit, I can take comment up until 4 PM EST today, July 24, 2019.

Best,

Porter Wells
Litigation Intelligence Reporter

Bloomberg Law

Ex. 6 Personal Privacy (PP)
pwells@bloomberglaw.com

Message

From: Drinkard, Andrea [Drinkard.Andrea@epa.gov]
Sent: 7/10/2019 3:49:22 PM
To: Grantham, Nancy [Grantham.Nancy@epa.gov]; Press [Press@epa.gov]
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

Mike, **Ex. 5 Deliberative Process (DP)**

From: Grantham, Nancy
Sent: Wednesday, July 10, 2019 11:47 AM
To: Press <Press@epa.gov>
Subject: FW: Journalism and environmental groups urge EPA to delay FOIA regulation

Ex. 5 Deliberative Process (DP)

thanks ng

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 10, 2019 11:45 AM
To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

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Sent: Wednesday, July 10, 2019 8:50 AM
To: schiermeyer.corry@epa.gov; abboud.michael@epa.gov; Press <Press@epa.gov>
Subject: Re: Journalism and environmental groups urge EPA to delay FOIA regulation

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Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

Ex. 6 Personal Privacy (PP) (c)

202-737-5299 (f)

Follow me [@KevinBogardus](https://twitter.com/KevinBogardus)

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EnergyWire, ClimateWire, E&E Daily, Greenwire, E&ENews PM, E&ETV

<2019.07.09 Letter from Orgs to EPA re FOIA Regulations Update Rule FINAL-1.pdf>

Message

From: Grandoni, Dino [Dino.Grandoni@washpost.com]
Sent: 7/24/2019 9:11:42 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Press [Press@epa.gov]
Subject: Re: Questions from Washington Post about new FOIA rule

thanks for this, and the call!

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 24, 2019 5:06 PM
To: Grandoni, Dino <Dino.Grandoni@washpost.com>; Press <Press@epa.gov>
Subject: RE: Questions from Washington Post about new FOIA rule

Here is the chart.

FOIAonline Numbers			
Year (FY or CY)	EPA	HQ	AO
FY 2013	9,890	1,929	141
FY 2014	10,425	1,887	106
FY 2015	10,857	1,925	215
FY 2016	10,356	2,127	203
FY 2017	11,494	3,592	1045
FY 2018	11,341	3,547	937
FY 2019 (so far)	7,212	3,654	413
CY 2013	9,733	1,928	142
CY 2014	10,958	1,955	139
CY 2015	10,522	1,906	201
CY 2016	10,362	2,159	243
CY 2017	11,946	4,001	1,201
CY 2018	10,951	3,793	847
CY 2019 (so far)	4,800	2,517	270
<i>*Information as of 4:00 PM EDT</i>			

From: Grandoni, Dino <Dino.Grandoni@washpost.com>
Sent: Wednesday, July 24, 2019 2:54 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: Re: Questions from Washington Post about new FOIA rule

Just before 7 a.m. tomorrow morning. Thanks again...

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 24, 2019 2:52 PM
To: Grandoni, Dino <Dino.Grandoni@washpost.com>; Press <Press@epa.gov>
Subject: RE: Questions from Washington Post about new FOIA rule

Possible, I will ask our team and see what they can provide in time. When do you need this by?

From: Grandoni, Dino <Dino.Grandoni@washpost.com>
Sent: Wednesday, July 24, 2019 2:50 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: Re: Questions from Washington Post about new FOIA rule

Thanks for the responses! To make things simpler, maybe you could give me the total number of requests for 2018, 2017, 2016 and 2015 so I can compare end of Obama administration to beginning of Trump administration. Is that more doable?

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 24, 2019 2:45 PM
To: Grandoni, Dino <Dino.Grandoni@washpost.com>; Press <Press@epa.gov>
Subject: RE: Questions from Washington Post about new FOIA rule

CAUTION: EXTERNAL SENDER

Hey Dino, the third question we can answer but might take a bit of time to compile. Are you looking as a whole or comparatively the first 2.5 years or each admin?

Also here is for the other two. We don't comment on pending litigation. And for the other question.

"Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA's FOIA program. After many years of delay, EPA's FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false." – **Michael Abboud, EPA spokesman**

From: Grandoni, Dino <Dino.Grandoni@washpost.com>
Sent: Wednesday, July 24, 2019 2:27 PM
To: Press <Press@epa.gov>
Subject: Questions from Washington Post about new FOIA rule

Hi all,

Hope you're well. I'm writing in because I'm writing a story about EPA's (and Interior Department's) FOIA practices.

- 1) Does the EPA have a response to the lawsuit filed today by the Center for Biological Diversity and Environmental Integrity Project regarding the EPA's soon-to-be-finalized FOIA regulation?
- 2) Has Administrator Wheeler replied to the letter sent by Sens. Grassley, Leahy, Cornyn and Feinstein regarding the EPA rule?
- 3) Can you provide with updated figures on the number of FOIA requests during the Trump administration vs. Obama administration (in order to demonstrate for readers the uptick of requests the agency is dealing with)? Is that uptick one of the reasons for the new FOIA regulations?

Let me know if you have any questions for me – **Ex. 6** Planning to publish tomorrow morning.

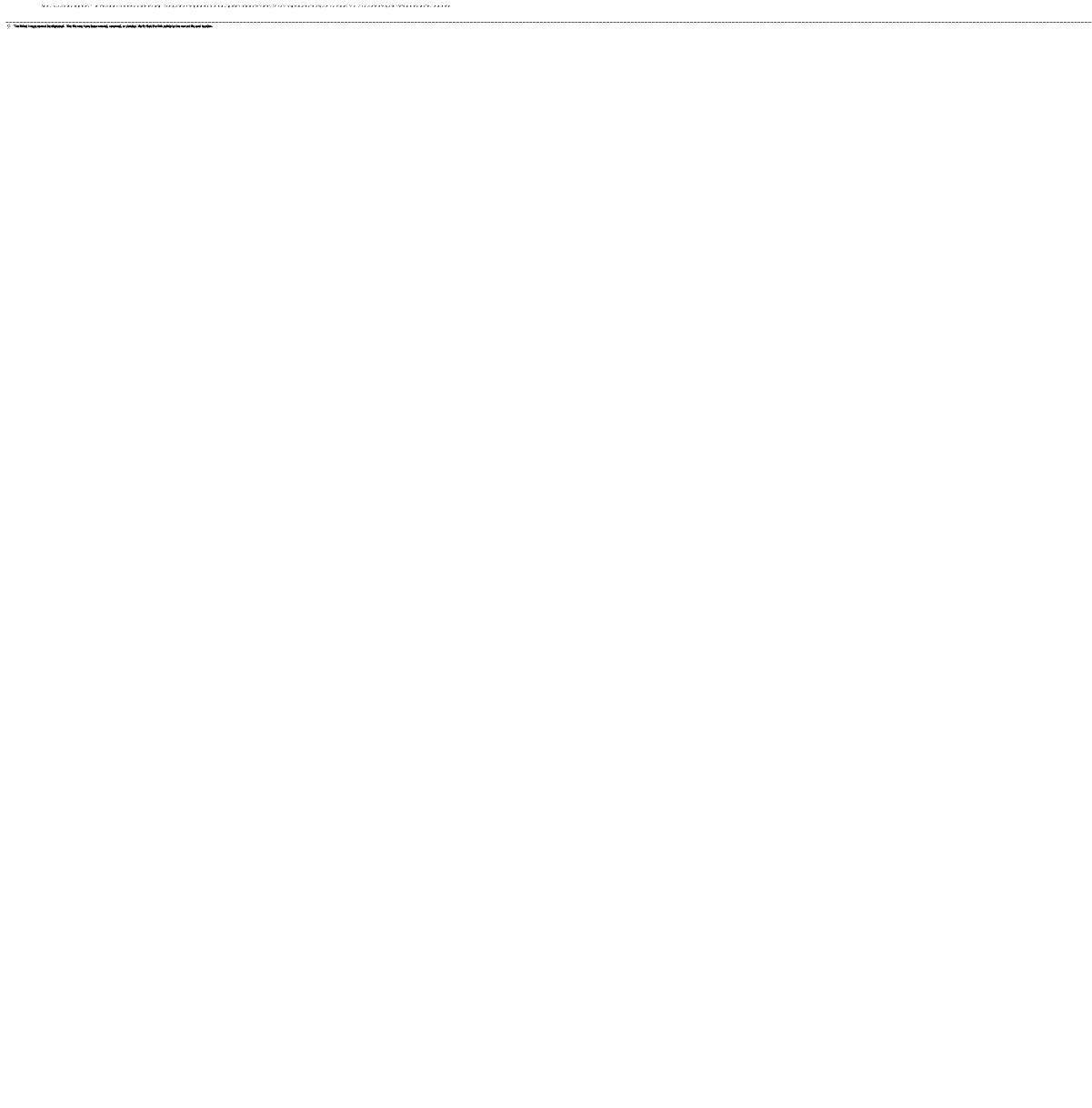
All the best,
Dino

Message

From: Sauerhage, Maggie [Sauerhage.Maggie@epa.gov]
Sent: 6/27/2019 8:07:03 PM
To: Press [Press@epa.gov]; Comm Directors and Alternates [Comm_Directors_and_Alternates@epa.gov]; Regional Public Affairs Directors [Regional_Public_Affairs_Directors@epa.gov]; AO-OCIR Everyone [AOCIR_Everyone@epa.gov]; AO OPA Internal Communications [AO_OPA_Internal_Communications@epa.gov]; AO OPA Immediate Office [AO_OPA_Immediate_Office@epa.gov]; AO OPA Web Communications [AO_OPA_Web_Communications@epa.gov]
Subject: Newsroom: EPA's Response to Society of Environmental Journalists

In the newsroom: <https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>

From: EPA Press Office <press@epa.gov>
Sent: Thursday, June 27, 2019 3:56 PM
To: Sauerhage, Maggie <Sauerhage.Maggie@epa.gov>
Subject: EPA's Response to Society of Environmental Journalists



EPA's Response to Society of Environmental Journalists

This week several media outlets misrepresented EPA's new FOIA regulation, and were forced to correct their misreporting. This new regulation brings the Agency into compliance with the Congressional amendments to FOIA from 2007, 2009, and 2016. Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations. The Obama administration failed to meet this deadline.

Yesterday, the Society of Environmental Journalists (SEJ), whose mission states that they strive to "strengthen the quality" of environmental journalism, sent a letter to EPA Administrator Andrew Wheeler which included numerous inaccuracies that were regurgitated from false articles. Below is EPA's response to the SEJ, signed by EPA career officials.

BELOW IS THE LETTER IN FULL:

Dear Director Parker:

On behalf of the Administrator of the U.S. Environmental Protection Agency, we write in response to your letter dated, June 26, 2019. Together we manage the Agency's National Freedom of Information Act Office, which advises the Agency on legal issues pertaining to FOIA requests, coordination, and project management. Additionally, we are the two career attorneys tasked with providing the recommendations to update the Agency's FOIA regulations.

This week EPA finalized an updated FOIA regulation that brings the Agency into compliance with a series of Congressional amendments. Unfortunately, a series of false and misleading claims have relayed inaccurate information to the public about this updated regulation. The Agency believes it is important to address these significant misrepresentations and emphasize that the update to the Agency's FOIA regulation in no way expands or increases the authority of political officials in the FOIA process. The Agency's updated regulation does not grant political officials' additional authority to review or withhold FOIA documents, their authority will remain consistent with the authority granted to them under the past regulation.

1. EPA did not expand political officials' oversight of FOIA responses.

EPA's updated FOIA regulation did not change the political officials with FOIA decisionmaking authority or expand their authority.

In fact, the FOIA decisionmakers identified in EPA's updated regulation are nearly identical to the list in EPA's old regulations at 40 CFR 2.104(h).

EPA's updated regulation now expressly lists the Administrator, who always had full FOIA decisionmaking authority under the statute, itself. The updated regulations have not increased or otherwise altered the Administrator's authority to make decisions under FOIA.

EPA's updated regulation also expressly lists the Deputies in Program and Regional Offices. These officials always had FOIA decisionmaking authority under the regulations as "designees." Deputies most frequently include the top career official in each program and regional office. Rather than expanding political officials' oversight - which this language did not do - this change expressly recognizes the role of career officials.

In fact, FOIA responses are rarely, issued by political employees -- to the contrary, such decisions typically are issued at the career director or career branch chief level. The updated regulation is not expected to impact or alter that practice.

2. EPA did not expand political officials' power.

EPA's updated regulation did not and cannot change the statute Congress passed.

FOIA determinations have always included decisions to withhold records or to issue "no records" responses. The updated regulation does not grant more power than EPA's prior regulations.

EPA's prior rules provided in section 104(g) that "[a]n adverse determination consists of . . . a determination that a requested record does not exist or cannot be located[.]" EPA's new updated regulation does not state anything more than this.

3. EPA's decision to centralize the intake process will speed FOIA processing, not slow it.

EPA's decision to streamline submission of FOIA requests to its National FOIA Office will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

In 2018, the FOIA Federal Advisory Committee, convened by the National Archives, recommended that federal departments and agencies "centralize FOIA processing where appropriate." Centralized FOIA submission will allow EPA to ensure consistent and coordinated communication with the public, regions, and program offices.

Many other departments and agencies have gone further than EPA in streamlining the FOIA processing, such as Department of State, USAID, Social Security Administration (in the Office of General Counsel), the Securities and Exchange Commission, and Commodity Futures Trading Commission (in the Office of General Counsel), among others. EPA has left the FOIA response decisionmaking authority with the offices that

are document custodians. Department of Labor has a similar centralized FOIA submission mailbox and decentralized FOIA processing and response structure.

Centralized FOIA intake and initial review will allow EPA to minimize coordination required for initial assignment of FOIA requests and to ensure consistency in early outreach to requesters.

4. EPA's decision to publish a final rule does not violate Administrative law

EPA's decision to increase efficiency by providing a single location for the public to submit FOIA requests is a procedural rule that does not require notice and comment under the Administrative Procedure Act.

EPA also published its FOIA updated regulation as a final rule without notice and public comment because EPA had no discretion for the changes mandated by the amendments to FOIA in 2007, 2009, and 2016.

Many other agencies similarly published final rules to implement these amendments without notice and comment. Those include:

- Housing and Urban Development, 82 FR 3619 (01/12/2017)
- NEH, National Foundation on the Arts and the Humanities, 82 FR 44 (01/03/2017)
- U.S. Nuclear Regulatory Commission, 81 FR 96344 (12/30/2016)
- Department of Energy, 81 FR 94915 (12/27/2016)
- U.S. International Trade Commission, 81 FR 86575 (12/01/2016)
- Farm Credit Administration, 81 FR 63365 (09/15/2019)
- Surface Transportation Board, 81 FR 90750 (12/15/2019)
- Office of Special Counsel, 82 FR 15609 (03/30/2017)
- National Labor Relations Board, 82 FR 11748 (02/24/2017)
- National Council on Disability, 81 FR 93791 (12/22/2016)
- Tennessee Valley Authority, 82 FR 41511 (09/01/2017)
- Defense Nuclear Facilities Safety Board, 82 FR 30722 (07/03/2017)

5. EPA regions are still empowered to grant requests

Under the updated regulation regional offices have the authority to grant FOIA requests.

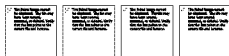
The updated regulation only centralizes the intake of FOIA requests to the National FOIA Office; it does not centralize the searching, reviewing, or production of records.

The updated regulation, like the 2002 regulations, continues to provide regional administrators, their deputies, and delegates the authority to issue final determinations.

Best Regards,

Elise Packard, Acting Deputy General Counsel for Operations

Timothy Epp, Acting Director, National EPA FOIA Office



U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004



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Message

From: Dawn Reeves [dreeves@iwpnews.com]
Sent: 7/23/2019 5:42:05 PM
To: Abboud, Michael [abboud.michael@epa.gov]
CC: Press [Press@epa.gov]
Subject: RE: FOIA rule question

Thanks much.
Dawn

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, July 23, 2019 1:22 PM
To: Dawn Reeves <dreeves@iwpnews.com>
Cc: Press <Press@epa.gov>
Subject: Re: FOIA rule question

“Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA’s FOIA program. After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” – **Michael Abboud, EPA spokesman**

Sent from my iPhone

On Jul 23, 2019, at 12:35 PM, Dawn Reeves <dreeves@iwpnews.com> wrote:

Hi Michael,
I’m writing about the senators’ letter from yesterday asking EPA to delay the FOIA rule. Will you consider?
Thanks,
Dawn Reeves
Inside EPA

Message

From: Meg Cunningham [meg.cunningham@fiscalnote.com]
Sent: 6/25/2019 6:48:25 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Press [Press@epa.gov]
Subject: Press Request CQ Roll Call

Hi there,

Meg Cunningham with CQ Roll Call. I'm looking to get a quick comment on the new FOIA rule from someone in the administration. Ideal deadline on this is 3:45p today.

Questions:

-This rule essentially allows for appointees to determine if records are responsive to a request. Do you have any firm definitions for what will deem something responsive as to not? Or will these decisions be on a case by case basis in which the appointee will be able to filter through results to determine what may be released?

-Will you determine that non-responsive records are "no records"? Are there parameters in place to differentiate the two?

Thanks!
Meg

Message

From: Kevin Bogardus [kbogardus@eenews.net]
Sent: 7/24/2019 4:14:12 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]; Press [Press@epa.gov]
Subject: RE: Litigation and legislation against EPA's FOIA reg

Thanks, Mike. I will add this to the story. Thanks again and talk to you later.

Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

Ex. 6 Personal Privacy (PP) (c)

202-737-5299 (f)

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EnergyWire, ClimateWire, E&E Daily, Greenwire, E&ENews PM, E&ETV

From: Abboud, Michael [abboud.michael@epa.gov]
Sent: Wednesday, July 24, 2019 11:53 AM
To: Kevin Bogardus; Schiermeyer, Corry; McFaul, Jessica; Beach, Christopher; Press
Subject: RE: Litigation and legislation against EPA's FOIA reg

Kevin we don't comment on pending litigation. On the other question see below.

"Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA's FOIA program. After many years of delay, EPA's FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false." – **Michael Abboud, EPA spokesman**

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 24, 2019 10:59 AM
To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Press <Press@epa.gov>
Subject: Litigation and legislation against EPA's FOIA reg

Hey everyone,

It's Kevin Bogardus with E&E News.

I'm working on a story about EPA's new Freedom of Information Act regulation, which has already sparked legislation and litigation. I noticed that Citizens for Responsibility and Ethics in Washington has filed a lawsuit against this regulation, which I plan to link and quote from in my story (please see attached). In addition, Republican and Democratic senators

have introduced legislation targeting the regulation (https://www.eenews.net/assets/2019/07/24/document_gw_01.pdf). I had a few questions about this, which are:

-- What is EPA's reaction to litigation against its new FOIA regulation?

-- What is EPA's reaction to legislation that takes issue with "the basis of responsiveness" language in its new FOIA regulation?

Please get back to me as soon as possible. My deadline is noon EST today but the sooner you get back to me, the more it helps my reporting. Also, since I'm working from home today, please email me here or call my cell phone at 202-247-7844. Thank you for your help.

Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

Ex. 6 Personal Privacy (PP) (c)

202-737-5299 (f)

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Message

From: Kevin Bogardus [kbogardus@eenews.net]
Sent: 7/10/2019 7:04:24 PM
To: Abboud, Michael [abboud.michael@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Press [Press@epa.gov]
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

Thanks Mike. Appreciate it. I will add your statement in the story. Thanks again and talk to you later.

-Kevin

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 10, 2019 3:00 PM
To: Kevin Bogardus <kbogardus@eenews.net>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Press <Press@epa.gov>
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

New statement for your story:

"After many years of delay, EPA's FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. This rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible." – **Michael Abboud, EPA spokesman**

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 10, 2019 12:05 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Press <Press@epa.gov>
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

Thanks Mike. I will include the below from you in my story. Thanks again and talk to you later.

EPA spokesman Michael Abboud referred E&E News to the agency's previous press releases defending the FOIA regulation when contacted for this story.

-Kevin

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Wednesday, July 10, 2019 11:49 AM
To: Kevin Bogardus <kbogardus@eenews.net>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Press <Press@epa.gov>
Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

I refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>
<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

From: Kevin Bogardus <kbogardus@eenews.net>

Sent: Wednesday, July 10, 2019 11:45 AM

To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>

Subject: RE: Journalism and environmental groups urge EPA to delay FOIA regulation

Hey everyone, I just wanted to check in one last time before my deadline of noon EST today. Any thoughts on the below? Please let me know. Thanks again for your help.

-Kevin

From: Kevin Bogardus <kbogardus@eenews.net>

Sent: Wednesday, July 10, 2019 8:50 AM

To: schiermeyer.corry@epa.gov; abboud.michael@epa.gov; Press <Press@epa.gov>

Subject: Re: Journalism and environmental groups urge EPA to delay FOIA regulation

Hey guys, Kevin Bogardus with E&E News here, checking in this morning as promised. Any thoughts on the below? Please let me know before my deadline of noon EST today. Thanks for your help.

-Kevin

Sent from my iPhone

On Jul 9, 2019, at 8:21 PM, Kevin Bogardus <kbogardus@eenews.net> wrote:

Hey everyone,

It's Kevin Bogardus with E&E News. My apologies for the evening email. I will check in again tomorrow morning.

I'm working on a story about journalism and environmental groups urging EPA to delay its new Freedom of Information Act regulations. I had a few questions about this, which are:

-- In letters sent yesterday to EPA, both journalism groups (please see <https://www.rcfp.org/wp-content/uploads/2019/07/7-9-19-News-Media-Coalition-Letter-to-EPA-re-FOIA-Reg-Amendments.pdf>) and environmental groups (please see attached) urged EPA to delay implementation of its new FOIA regulation and open it up for a public comment period. Does EPA plan to delay implementation of its new FOIA regulation and/or open it up for a public comment period? Why or why not?

-- The Society of Environmental Journalists also responded to EPA's letter last week in a separate letter yesterday (<https://www.sej.org/sites/default/files/packard-epp-sej-letter07092019.pdf>). Does EPA have any response to this latest SEJ letter?

Please get back to me as soon as possible. My deadline is noon EST Wednesday, July 10, but the sooner you get back to me, the more it helps my reporting. Thank you for your help.

Kevin Bogardus

E&E News Reporter

kbogardus@eenews.net

202-446-0401 (p)

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202-737-5299 (f)

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<2019.07.09 Letter from Orgs to EPA re FOIA Regulations Update Rule FINAL-1.pdf>

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/27/2019 7:28:07 PM
To: Grantham, Nancy [Grantham.Nancy@epa.gov]
Subject: FW: EPA's Response to Society of Environmental Journalists Letter - Preview
Attachments: 2019.6.27_EPA_SEJ.pdf

From: Willey, Katharine
Sent: Thursday, June 27, 2019 2:30 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Konkus, John <konkus.john@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>
Subject: RE: EPA's Response to Society of Environmental Journalists Letter - Preview

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael

Sent: Thursday, June 27, 2019 2:00 PM

To: Jackson, Ryan <jackson.ryan@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Konkus, John <konkus.john@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>

Subject: FW: EPA's Response to Society of Environmental Journalists Letter - Preview

With updated edits.

From: EPA Press Office <press@epa.gov>

Sent: Thursday, June 27, 2019 1:59 PM

To: Abboud, Michael <abboud.michael@epa.gov>

Subject: EPA's Response to Society of Environmental Journalists Letter - Preview

EPA's Response to Society of Environmental Journalists

Ex. 5 Deliberative Process (DP)

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Ex. 5 Deliberative Process (DP)

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue Northwest
Washington, D.C. 20004



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Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/10/2019 2:05:36 PM
To: Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Epp, Timothy [Epp.Timothy@epa.gov]
CC: Beach, Christopher [beach.christopher@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]
Subject: FW: Journalism and environmental groups urge EPA to delay FOIA regulation

Ex. 5 Deliberative Process (DP)

From: Kevin Bogardus <kbogardus@eenews.net>
Sent: Wednesday, July 10, 2019 8:50 AM
To: Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: Re: Journalism and environmental groups urge EPA to delay FOIA regulation

Hey guys, Kevin Bogardus with E&E News here, checking in this morning as promised. Any thoughts on the below? Please let me know before my deadline of noon EST today. Thanks for your help.

-Kevin

Sent from my iPhone

On Jul 9, 2019, at 8:21 PM, Kevin Bogardus <kbogardus@eenews.net> wrote:

Hey everyone,

It's Kevin Bogardus with E&E News. My apologies for the evening email. I will check in again tomorrow morning.

I'm working on a story about journalism and environmental groups urging EPA to delay its new Freedom of Information Act regulations. I had a few questions about this, which are:

-- In letters sent yesterday to EPA, both journalism groups (please see <https://www.rcfp.org/wp-content/uploads/2019/07/7-9-19-News-Media-Coalition-Letter-to-EPA-re-FOIA-Reg-Amendments.pdf>) and environmental groups (please see attached) urged EPA to delay implementation of its new FOIA regulation and open it up for a public comment period. Does EPA plan to delay implementation of its new FOIA regulation and/or open it up for a public comment period? Why or why not?

-- The Society of Environmental Journalists also responded to EPA's letter last week in a separate letter yesterday (<https://www.sej.org/sites/default/files/packard-epp-sej-letter07092019.pdf>). Does EPA have any response to this latest SEJ letter?

Please get back to me as soon as possible. My deadline is noon EST Wednesday, July 10, but the sooner you get back to me, the more it helps my reporting. Thank you for your help.

Kevin Bogardus
E&E News Reporter
kbogardus@eenews.net
202-446-0401 (p)

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202-737-5299 (f)

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<2019.07.09 Letter from Orgs to EPA re FOIA Regulations Update Rule FINAL-1.pdf>

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/14/2019 6:44:25 PM
To: Jackson, Ryan [jackson.ryan@epa.gov]
CC: Hewitt, James [hewitt.james@epa.gov]
Subject: FOIA regulation

Talked with OP, they missed the courier today and it won't be dropped off at the FR till Monday. Meaning it won't publish until Thursday at the earliest, but more likely Friday.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Michael Abboud
U.S. Environmental Protection Agency
Office of Public Affairs
M: **Ex. 6 Personal Privacy (PP)**

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/8/2019 9:49:38 PM
To: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: FW: on deadline comment

Just an FYI

From: Rebecca Beitsch <rebecca@thehill.com>
Sent: Monday, July 8, 2019 5:49 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: Re: on deadline comment

Sure thing. Upon second glance I realized that quote wasn't broad enough. I sent some other stuff to my ed who will add it in. (I'm sitting on a flight that's about to take off)

On Mon, Jul 8, 2019 at 5:46 PM Abboud, Michael <abboud.michael@epa.gov> wrote:

That is fine to include but I ask that you include a mention of that fact that EPA has pushed back against mischaracterizations of this new rule change previously.

We may have something specific for this letter soon, but probably not tonight.

From: Rebecca Beitsch <rebecca@thehill.com>
Sent: Monday, July 8, 2019 5:44 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: Re: on deadline comment

"EPA expects to improve the efficiency and consistency of its intake and assignment processing, including more consistent and earlier outreach to requesters, through centralizing these functions into one office at the Agency," the EPA said in a statement when it first announced the rule change.

On Mon, Jul 8, 2019 at 5:42 PM Abboud, Michael <abboud.michael@epa.gov> wrote:

Which one was that?

From: Rebecca Beitsch <rebecca@thehill.com>
Sent: Monday, July 8, 2019 5:42 PM

To: Abboud, Michael <abboud.michael@epa.gov>

Subject: Re: on deadline comment

I will just use the statement Miranda originally used in the story.

Thanks for getting back to me!

On Mon, Jul 8, 2019 at 5:32 PM Abboud, Michael <abboud.michael@epa.gov> wrote:

Got it thank you. I would just refer you back to our previous releases on this matter below.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>

<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

From: Rebecca Beitsch <rebecca@thehill.com>

Sent: Monday, July 8, 2019 5:29 PM

To: Abboud, Michael <abboud.michael@epa.gov>

Cc: Press <Press@epa.gov>

Subject: Re: on deadline comment

Just sent to you directly.

Rebecca Beitsch

Energy and Environment Reporter

The Hill

rebecca@thehill.com | [@rebeccabeitsch](https://twitter.com/rebeccabeitsch)

On Mon, Jul 8, 2019 at 5:26 PM Abboud, Michael <abboud.michael@epa.gov> wrote:

What's the letter?

Sent from my iPhone

On Jul 8, 2019, at 5:26 PM, Rebecca Beitsch <rebecca@thehill.com> wrote:

Hi,

Do you have a response to the letter a coalition of environmental groups sent today in regards to EPA's new FOIA policy?

Thanks!

Rebecca Beitsch

Energy and Environment Reporter

The Hill

rebecca@thehill.com | [@rebeccabeitsch](https://twitter.com/rebeccabeitsch)

--

Rebecca Beitsch

Energy and Environment Reporter

The Hill

rebecca@thehill.com | [@rebeccabeitsch](https://twitter.com/rebeccabeitsch)

--

Rebecca Beitsch

Energy and Environment Reporter

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--

Rebecca Beitsch

Energy and Environment Reporter

The Hill

rebecca@thehill.com | [@rebeccabeitsch](https://www.instagram.com/rebeccabeitsch)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC08CBF9ED3CE-ABBOUD, MIC]
Sent: 6/24/2019 2:35:15 PM
To: Rodriguez, Alejandra [rodriguez.alejandra@epa.gov]
Subject: RE: the hill

<https://thehill.com/policy/energy-environment/423328-new-interior-foia-rule-could-make-it-harder-to-get-public-documents>
<https://thehill.com/policy/energy-environment/420632-former-koch-adviser-to-take-over-interiors-foia-requests>
<https://thehill.com/policy/energy-environment/423954-interior-department-wont-accept-foia-requests-during-shutdown>

From: Abboud, Michael
Sent: Monday, June 24, 2019 10:33 AM
To: Rodriguez, Alejandra <rodriguez.alejandra@epa.gov>
Subject: the hill

<https://thehill.com/policy/energy-environment/448955-green-groups-accuse-interior-dept-of-letting-political-appointees>
<https://thehill.com/policy/energy-environment/438645-dem-lawmakers-request-funding-to-beef-up-staff-at-interior-foia>

Michael Abboud
U.S. Environmental Protection Agency
Office of Public Affairs

M:

Ex. 6 Personal Privacy (PP)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/8/2019 9:31:18 PM
To: Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Epp, Timothy [Epp.Timothy@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]
CC: Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: FW: Enviro letter on EPA FOIA
Attachments: 2019.07.09 Letter from Orgs to EPA re FOIA Regulations Update Rule FINAL.pdf

Just sending her our releases on this for now. If you all have any interest in a different response let me know.

From: Rebecca Beitsch <rebecca@thehill.com>
Sent: Monday, July 8, 2019 5:28 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: Fwd: Enviro letter on EPA FOIA

Rebecca Beitsch
Energy and Environment Reporter
The Hill
rebecca@thehill.com | [@rebeccabeitsch](https://twitter.com/rebeccabeitsch)

----- Forwarded message -----

From: Adam Beitman, Sierra Club <adam.beitman@sierraclub.org>
Date: Mon, Jul 8, 2019 at 4:08 PM
Subject: Enviro letter on EPA FOIA
To: Miranda Green <mgreen@thehill.com>, Rebecca Beitsch <rbeitsch@thehill.com>

Thought this would be of interest to you given breaking the story initially!

--



Adam Beitman
Deputy Director, Media Relations

50 F Street, NW, Eighth Floor
Washington, DC 20001

Office: (202) 675-2385 Ex. 6 Personal Privacy (PP)
adam.beitman@sierraclub.org Tweets @adbeitman

Represented by the Progressive Workers Union (PWU)



1000 Vermont Avenue NW
Suite 1100
Washington, DC 20005
T 202 296 8800
F 202 296 8822
environmentalintegrity.org

July 9, 2019

Sent via certified mail and electronic mail

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, DC 20640
wheeler.andrew@epa.gov

Re: Concerns Over EPA's "FOIA Regulations Update" Final Rule

Dear Administrator Wheeler,

The Environmental Integrity Project, Center for Biological Diversity, Chesapeake Bay Foundation, Earthjustice, Environmental Defense Center, Environmental Defense Fund, Essential Information, Food & Water Watch, Friends of the Earth, the Harvard Law School Emmet Environmental Law and Policy Clinic, Natural Resources Defense Council, Northwest Environmental Advocates, Our Children's Earth Foundation, Sierra Club, Southern Environmental Law Center, and Union of Concerned Scientists, (collectively, "Public Interest Groups"), respectfully write to express their strong concerns regarding the "FOIA Regulations Update" final rule promulgated by the Agency, without notice or an opportunity for public comment, on June 26, 2019 (the "Rule").¹

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."² Because "disclosure, not secrecy, is the dominant objective" of FOIA, it embodies a "philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language," and explicitly "seeks to permit access to official information long shielded unnecessarily from public view" and "to create a judicially enforceable right to secure such information from possibly unwilling official hands."³

Public Interest Groups are all non-profit organizations with a longstanding and continuing reliance on FOIA – both on their own behalf and/or on behalf of their members, clients, or partners – and are concerned that this new Rule will unduly impair the public's right and ability to apprise itself of important agency actions. While this letter summarizes some of our key substantive concerns regarding the new Rule, it is not an exhaustive list. We strongly

¹ 84 Fed. Reg. 30,028 (June 26, 2019).

² *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

³ *U.S. Dep't of Air Force v. Rose*, 425 U.S. 352, 360–61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

urge EPA to delay implementation of the Rule until the Agency has conducted a sufficient period of notice and comment, in accordance with the requirements of the Administrative Procedure Act (“APA”). In brief, this letter addresses concerns with (i) the Rule’s inappropriate authorization of political appointees to issue FOIA determinations; (ii) the Rule’s requirement that all FOIA requests be submitted to, and reviewed by, EPA Headquarters; (iii) the Rule’s apparent authorization of a new basis for withholding records based on their “responsiveness,” which contradicts both FOIA and judicial precedent; and (iv) the lack of public notice and comment as required by the APA. These aspects of the Rule contravene not only the requirements of FOIA and the APA, but also the fundamental purpose of FOIA to ensure an informed public and transparency in government.

The Rule inappropriately authorizes political appointees to make FOIA determinations and significantly increases the potential for abuse of the FOIA process.

Any politicization of FOIA undermines its core functions of enabling the public to inform itself on what its government is up to, and to hold officials accountable for those actions. This is precisely why prior administrations, from both sides of the aisle, have historically taken pains to partition political appointees from FOIA processes. Under the Obama administration, political appointees at EPA were rarely involved in the FOIA response process at all, and participated only when they themselves had responsive records to provide.⁴ Under former Administrator Scott Pruitt, EPA departed sharply from this longstanding bipartisan practice in implementing a “political awareness review” policy, under which political staff were not only authorized to issue FOIA determinations and overrule career FOIA staff, but were required to approve all FOIA requests.⁵ In an interview with the House Oversight Committee, Chief of Staff Ryan Jackson indicated political staff had applied this review process to FOIA requests they deemed “politically charged.”⁶

On November 16, 2018, Mr. Jackson issued an agency-wide Awareness Notification Process memorandum which explicitly superseded this political awareness review process.⁷ The memo specifically stated that awareness review is “not an approval process,” that reviewers are not permitted to issue or alter FOIA determinations made by career staff, and that only “FOIA staff, program staff, and program managers will... determine whether information should be

⁴ U.S. EPA Office of Inspector General. *Report No. 15-N-0261: Response to Congressional Request Concerning Political Interference in Release of Documents Under the Freedom of Information Act*. August 20, 2015. <https://www.epa.gov/sites/production/files/2015-09/documents/20150820-15-p-0261.pdf>

⁵ Letter from Ranking Member Elijah E. Cummings (now Chairman) of the House Oversight Committee, to former EPA Administrator Scott Pruitt. June 11, 2018. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-06-11.EEC%20to%20Pruitt%20re.%20FOIA%20requests.pdf>

⁶ Subpoena Request from Ranking Member Cummings to Committee Chairman Trey Gowdy. July 13, 2018. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2018-07-13.EEC%20to%20Gowdy%20re.FOIA%20Subpoena.pdf>

⁷ Memorandum from Ryan Jackson, EPA Chief of Staff, to all EPA staff re: Awareness Notification Process for Select Freedom of Information Act Releases. November 16, 2018. <http://www.environmentalintegrity.org/wp-content/uploads/2018/11/epa-memo.pdf>

released or withheld under FOIA’s exemptions.”⁸ Political appointees were notably not identified as part of EPA’s usual FOIA process in Mr. Jackson’s memorandum.

EPA’s new Rule, however, **explicitly** authorizes political appointees – including (but not limited to) yourself, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, and Deputy Regional Administrators, and any of “those individuals’ delegates” – to make FOIA determinations. 40 C.F.R. § 2.103(b). The Rule effectively permits political appointees – including EPA Administrators – to circumvent the awareness notification process entirely by assuming the direct authority to deny FOIA requests themselves. Since the purported purpose of the November 2018 memorandum and the procedures it espouses was to insulate EPA’s FOIA review from precisely this kind of interference, it is difficult to see how these policies can be reconciled, or how the new Rule can be seen as “promoting transparency and building public trust” in the Agency’s FOIA process. To the contrary, because recent FOIAs by Public Interest Groups and others have revealed numerous embarrassing and even career-ending scandals for former Administrator Pruitt and others, EPA’s changes to 40 C.F.R. § 2.103(b) suggest that EPA is attempting to limit transparency and grant more control over records to political staff in response – a suspicion necessarily bolstered by EPA’s failure to allow any opportunity for public comment.

While the new Rule’s explicit grant of FOIA authority to political appointees is concerning enough, EPA’s deliberate omission of any appreciable limitations regarding who may be “delegated FOIA decision making authority” compounds the potential for abuse of the FOIA process by political appointees. The Agency’s conclusion that “it is not necessary to set forth such delegations, and limitations, in Agency regulations,” is especially puzzling as the Agency explicitly states that it was necessary to revise § 2.103(b) in the first place “because the term ‘division director’ is not easily interpreted across the Agency.”⁹ If the term “division director” was so inscrutable to Agency staff as to require an explicitly codified definition, surely the term “division director’s designee” merits a similarly explicit clarification. It is difficult to see how the Rule’s express authorization of political appointees to not only make FOIA determinations, but to also delegate that authority to *anyone*, including other political appointees, can meaningfully insulate the FOIA process from potential abuse. Public Interest Groups respectfully submit that such an intentionally ill-defined delegation loophole all but ensures that the question is not whether the FOIA process will be abused, but only how pervasive such future abuses will be.

**Requiring all FOIA requests to be submitted to, and reviewed by,
EPA Headquarters increases the potential for political abuse of the FOIA process.**

The potential for political staff to abuse the FOIA process is only exacerbated by the Rule’s substantial revision of 40 C.F.R. § 2.101(a) *requiring* all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. – the precise office where the majority of political appointees are located. Aside from this requirement intuitively granting political staff

⁸ *Id.*

⁹ *See* 84 Fed. Reg. at 30,031.

heightened opportunities to interfere with FOIA requests, it is difficult to see how this change could possibly improve the Agency's FOIA efficiency or enhance the public's lawful access to information. EPA's own internal audit of its FOIA program in 2016, which included agency-wide interviews and surveys of hundreds of career FOIA staff, found that career staff strongly preferred improving centralization of FOIA processes within regions themselves, over attempting to centralize FOIA at EPA HQ.¹⁰ Those same career staff also expressed wide concern that the Agency lacked the resources or staff actually necessary to support any successful centralization effort. As EPA has been experiencing pervasive issues meeting its FOIA obligations in the past two years as it is, and has frequently invoked a lack of resources and staff to justify its delays in processing FOIA requests, the wisdom of adding these additional procedural hurdles – which are neither necessary nor recommended by EPA's own FOIA staff – is highly questionable. Indeed, the new rules seem all but certain to both encourage inappropriate political interference and create unnecessary bottlenecks.

**The FOIA does not permit agencies to withhold records,
or portions of records, based on a determination of “non-responsiveness.”**

The Rule attempts to extend the Agency's ability to withhold records beyond the nine exemptions enumerated under FOIA. More specifically, the Rule revises 40 C.F.R. § 2.103(b) to impermissibly allow authorized individuals to “issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more exemptions under the FOIA, and to issue ‘no records’ responses” (emphasis added). The addition of this new language is troubling because § 2.104(h), which requires the Agency to notify the requester of any “adverse determination” under FOIA and provide the requester an opportunity to challenge said determination, expressly does *not* include determinations to “release or withhold a record or a portion of a record on the basis of responsiveness” within the definition of “adverse determinations.”

As the D.C. Circuit has explicitly (and recently) held, the law is clear that FOIA does not permit agencies to withhold a record or a portion of a record “on the basis of responsiveness.”¹¹ Once an agency has identified a record within the scope of a search, it must determine whether it falls under any of FOIA's enumerated exemptions, and promptly inform the requester of the basis for its determination. The U.S. Department of Justice's Office of Information Policy (OIP) FOIA guidance as far back as 1995 not only strongly discouraged agencies from asserting any determinations of “non-responsiveness” in the first place, but also stated that in any instance in which a requester disagrees, “the document pages involved should be included without question by the agency.”¹² The 1995 guidance also states that in all cases, at a minimum requesters *must* be informed of, and given an adequate opportunity to challenge, any determinations that a record or portion of a record is “non-responsive.” As the 1995 guidance indicates, even prior to *Am.*

¹⁰ See U.S. EPA, Office of Environmental Information. *Evaluation of EPA's FOIA Program: Final Report*. February 12, 2016. <https://www.epa.gov/sites/production/files/2016-12/documents/evaluation-foia-program-2-12-2016.pdf>

¹¹ *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 677 (D.C. Cir. 2016).

¹² U.S. DOJ. *OIP Guidance: Determining the Scope of a FOIA Request, FOIA Update*, Vol. XVI, No. 3 (1995), at page 2-4.

Immigration Lawyers, “non-responsiveness” determinations were heavily disfavored by DOJ. After *Am. Immigration Lawyers*, OIP revised its 2017 FOIA guidance accordingly to explicitly clarify that “it is not permissible to redact information within a record as ‘non-responsive,’” and that once an agency’s search has identified a record, the agency “must process it in its entirety for exemption applicability. Only those portions of the record that are exempt can be redacted.”¹³

In press releases following the Rule’s issuance, EPA has stated that the Rule does not authorize any agency action which would contradict the judicial precedent and DOJ’s longstanding interpretation of FOIA’s requirements described above.¹⁴ However, the plain text of the Rule’s revised § 2.103(b), which states that the Agency may “issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness,” contradicts both. If the Agency’s position is that § 2.103(b) cannot actually permit the Agency to make these determinations, it is unclear why the Agency amended § 2.103(b) to explicitly add this language. In order to ensure consistency and prevent unnecessary confusion regarding the Rule, Public Interest Groups respectfully request that EPA revise the Rule to either remove this language from § 2.103(b), or amend § 2.104(h) to explicitly include any “responsiveness” determinations within the definition of “adverse determinations.”

**The Rule should have been issued with appropriate notice and comment
as required by the Administrative Procedure Act.**

We strongly disagree with EPA’s assertion that public discussion of this rulemaking is “impracticable, unnecessary, or contrary to the public interest,” as well as EPA’s characterization of this Rule as making “minor and purely ministerial changes” within the scope of the procedural exemption.¹⁵ These changes are patently substantial, and EPA cannot validly claim that requiring all FOIA requests to be submitted directly to EPA Headquarters in Washington, D.C. is a mere “procedural” rule exempt from notice and comment. EPA’s invocation of the “good cause” exemption, which is “narrowly construed and only reluctantly countenanced,”¹⁶ on the grounds that “the agency lacks discretion to reach a different outcome in response to comment” is similarly befuddling. The 2016 FOIA Amendments require only that agencies periodically review and update their FOIA regulations. They certainly do not mandate many of the changes actually made by this Rule.

Notice and comment requirements serve two equally important purposes. The first is to ensure that citizens have a meaningful opportunity to provide input and objections regarding substantive agency rules that could affect the public – which this Rule plainly does. Second, and equally important, is to ensure that an agency has actually considered all relevant factors and concerns before acting, and is issuing its rules in a deliberative manner. EPA’s circumvention of these normal procedures fundamentally fails to serve either purpose, and clarifying the effect and scope of a rule through intermittent press releases – as EPA is currently doing – is precisely the

¹³ <https://www.justice.gov/oip/oip-guidance/defining-a-record-under-the-foia>

¹⁴ <https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

¹⁵ 84 Fed. Reg. at 30,029

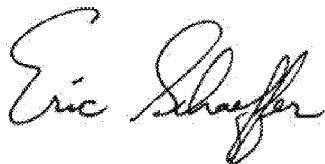
¹⁶ *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

sort of haphazard implementation and inconsistent, confusing guidance that notice and comment procedures are intended to prevent.

As you are aware, EPA's FOIA response and compliance rates have declined substantially in the past few years, which has significantly damaged the public's trust in the Agency and resulted in multiple Congressional inquiries regarding EPA's FOIA program.¹⁷ Regardless of the Agency's views on the matter, it is clear that wide portions of the public, as well as members of Congress, have significant concerns that this new Rule will only serve to make that program even more cumbersome, and ultimately make it more difficult for the public to obtain the information that is its right by law. As you yourself emphasized in a November 13, 2018 memo to all EPA staff, FOIA "is both a statutory obligation and an important tool for promoting transparency and building public trust in agency actions."¹⁸ Yet EPA's circumvention of the notice and comment process not only further undermines the public's faith in the integrity of EPA's FOIA procedures, but raises significant doubts as to whether EPA has proceeded with due care and consideration, as all agencies should prior to taking substantive actions.

We respectfully call on EPA to withdraw this illegally adopted Rule and remove the Rule's impermissibly provisions. EPA should only move forward with a revised Rule if it contains revisions that would actually improve the FOIA process, and the Agency must submit any revised Rule for appropriate notice and comment procedures, in order to ensure that both public and the Agency have an opportunity to meaningfully evaluate its contents. To do otherwise would contravene not only the APA, but basic tenets of good governance, rational decision-making, and your stated commitment to transparency and re-establishing the public trust in EPA's actions.

Sincerely,



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Protection and Restoration
Chesapeake Bay Foundation, Inc.

¹⁷ June 11, 2018 Letter from Cummings to former Administrator Pruitt, *supra* note 3.

¹⁸ November 16, 2018 Awareness Notification Process Memo, *supra* note 5.

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“Final Rule ‘Freedom of Information Act Regulations Update’”

The Trump EPA is committed to enhancing its implementation of the Freedom of Information Act, which is an important tool for promoting transparency and building public trust in EPA actions. This is why Administrator Wheeler has taken action to update the EPA’s FOIA regulations in line with Congressional direction. EPA has released a Final Rulemaking that revises EPA’s FOIA Regulations, 40 CFR Part 2, Subpart A.

Implements Statutory Amendments. The Rulemaking brings EPA’s FOIA Regulations into full compliance with the statute, something the Obama administration failed to do. The EPA’s FOIA Regulations were last updated in 2002, and Congress subsequently amended the FOIA three times, in 2007, 2009, and 2016. The 2016 amendment required all departments and agencies to update their FOIA regulations by the end of 2016, which did not occur at under the Obama administration.

This Rulemaking brings EPA into compliance with the statute by making nondiscretionary changes to eliminate outdated provisions and to ensure that EPA’s regulations are in full compliance with the FOIA as amended, including the following:

- Incorporate the statutory definition of “news media”;
- Refer to the statute for FOIA exemptions, and delete outdated exemption descriptions in EPA’s regulations;
- Incorporating statutory text regarding the fees that will not be charged to requestors when the Agency misses a processing deadline;
- Requiring response letters to include information that the statute requires including the basis for the determination, appeal rights, and availability of the FOIA public liaison;
- Extending the deadline for filing of an appeal from 30 to 90 days; and
- Allowing tolling of the response deadline only once to clarify the request.

Process improvements. The Rulemaking also reflects organizational changes that were made after EPA’s regulations were last updated in 2002, and it makes process improvements.

For example, the Rulemaking clarifies decisionmaking authority within EPA for FOIA responses and appeals. It recognizes the decision to move the National FOIA program into the Office of General Counsel to create the National FOIA Office. With more FOIA requests submitted electronically, it clarifies that requests submitted after 5:00 pm are received on the next business day.

The Rulemaking also centralizes FOIA request intake to the National FOIA Office in the Office of General Counsel. All incoming requests will be routed through the National FOIA Office for intake assessment and assignment to regions and headquarters offices for processing. In 2018, the National Archives’ FOIA Advisory Committee recommended that federal departments and agencies “centralize FOIA processing where appropriate.” The FOIA FACA identified the following as among the reasons for centralizing processing: “Decreases time spent coordinating between multiple teams; Increases efficiency of scale in training; Capitalizes upon common skills that can be applied across various types of requests; [and] Increases collaboration across

offices, which results in expanded shared knowledge and processing techniques.” (Pg.14)
Through EPA’s Lean Management efforts, the Agency’s FOIA Process Improvement Team recommended that EPA centralize the intake of FOIA Requests. EPA expects to improve the efficiency and consistency of its intake and assignment processing, including more consistent and earlier outreach to requesters, through centralizing these functions into one office at the Agency.

Why is the Agency Not Going Through Notice and Comment for this Rulemaking?

The Agency has determined that the changes in this Rulemaking qualify for either the good cause or procedural exceptions to the Administrative Procedure Act’s notice and comment requirements. The changes in the Rulemaking bring EPA's regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the Agency's internal organization, procedure, or practice.

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/27/2019 4:04:14 PM
To: Willey, Katharine [willey.katharine@epa.gov]
Subject: RE: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Perfect wanted to verify. Going to talk to Ryan in 15.

From: Willey, Katharine
Sent: Thursday, June 27, 2019 11:45 AM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: FW: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

It would be in response to the below letter.

From: Packard, Elise
Sent: Wednesday, June 26, 2019 2:33 PM
To: Willey, Katharine <willey.katharine@epa.gov>
Subject: FW: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Elise B. Packard
Acting Deputy General Counsel
U.S. EPA Office of General Counsel, Rm. 4020A
(202) 564-7729

From: Epp, Timothy
Sent: Wednesday, June 26, 2019 1:44 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: RE: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Yes – thanks.

Timothy R. Epp
| National FOIA Office
U.S. Environmental Protection Agency | Office of General Counsel
1200 Pennsylvania Avenue, N.W. (MC 2310A)
Washington, D.C. 20460 | WJCN 7309B
Phone (202) 564-2830 | epp.timothy@epa.gov



National FOIA Office
EPA Office of General Counsel

From: Fotouhi, David
Sent: Wednesday, June 26, 2019 1:40 PM
To: Epp, Timothy <Epp.Timothy@epa.gov>; Packard, Elise <Packard.Elise@epa.gov>
Subject: Fwd: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Making sure you've seen this incoming email from SEJ.

Sent from my iPhone

Begin forwarded message:

From: "Leopold, Matt (OGC)" <Leopold.Matt@epa.gov>
Date: June 26, 2019 at 1:12:07 PM EDT
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Schiermeyer, Corry" <schiermeyer.corry@epa.gov>, "Abboud, Michael" <abboud.michael@epa.gov>, "Fotouhi, David" <Fotouhi.David@epa.gov>
Subject: Re: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Ex. 5 Deliberative Process (DP)

Matt

Sent from my iPhone

On Jun 26, 2019, at 12:55 PM, Meaghan Parker <mparker@sej.org> wrote:

Dear Administrator Wheeler:

The Society of Environmental Journalists (SEJ) objects to EPA's June 26 Final Rulemaking entitled "Freedom of Information Act Regulations Update." It enables the agency to limit public access to EPA records that are legally public information. Moreover, the highly irregular procedure of issuing a final rule without proposal or public comments is unjustified and unlawful under the Administrative Procedure Act (APA).

SEJ is a professional and educational organization that represents 1,400 environmental journalists, professors and students. Our members, on behalf of the public, rely on FOIA to help the public understand the work of the U.S. Environmental Protection Agency. We are deeply concerned that the published FOIA rule changes will seriously harm the public's right to know.

Your claim to exempt this rulemaking from normal APA proposal-and-comment procedures is highly unusual and unwarranted. Moreover, we believe that it serves only to shield highly political decisions from public scrutiny. Neither the procedural nor the good cause exemptions to the APA apply to important parts of this rulemaking — which go beyond required updates to the regulation to drastically change EPA's handling of information requests. We strongly disagree with EPA's assertion that public discussion of this rulemaking is "impracticable, unnecessary, or contrary to the public interest." Circumventing the usual public comment process is a violation of the public trust and silences the voices of the citizens the EPA is bound to protect.

One of the rule's most worrisome changes grants authority to the Administrator (and a hierarchy of other political appointees) to determine which records are "responsive" to

a FOIA request. This determination takes place entirely before the records are reviewed or redacted for legitimate FOIA exemptions. It is arbitrary and invisible, and virtually impossible to appeal, because the agency need not disclose to the requester what records were initially found or why they were deemed non-responsive. This provision badly distorts the true and proper meaning, under FOIA, of “responsiveness.”

Another disturbing change centralizes final authority to grant or deny FOIA requests in the political parts of EPA headquarters. By altogether removing the authority of Regional Offices to grant FOIA requests, this change will slow and hobble the agency’s already poor performance, in addition to politicizing the decision-making process.

The rule furthermore tries to legitimize the placement of the National FOIA Office under the Office of General Counsel. This is contrary to recent statutory changes, which emphasize the independence of the agency’s Chief FOIA Officers.

Many of our members report that EPA’s lack of speedy handling of, and responsiveness to, FOIA requests already makes it difficult for them to do their job of informing the public about the environment in which they live. This new rule, we believe, will make that job even more difficult. It will impede the public’s access to environmental information and its right to know how tax dollars are spent.

We call on you to withdraw this rule and submit it for standard notice and comment as a proposal — thereby allowing a proper, meaningful public evaluation of its consequences.

Sincerely,
Meaghan E. Parker
Executive Director

Cc: leopold.matt@epa.gov
mutz.john@epa.gov
creech.christopher@epa.gov
schiermeyer.corry@epa.gov
abboud.michael@epa.gov

Meaghan Parker
Executive Director
Society of Environmental Journalists
P:(202) 558-2033 E: mparker@sej.org



<Administrator Wheeler_SEJ_June262019.pdf>

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/25/2019 5:28:58 PM
To: Schiermeyer, Corry [schiermeyer.corry@epa.gov]
CC: Konkus, John [konkus.john@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Epp, Timothy [Epp.Timothy@epa.gov]
Subject: RE: draft

Ex. 5 Deliberative Process (DP)

From: Schiermeyer, Corry
Sent: Tuesday, June 25, 2019 1:22 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Cc: Konkus, John <konkus.john@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; McFaul, Jessica <mcfaul.jessica@epa.gov>; Beach, Christopher <beach.christopher@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Epp, Timothy <Epp.Timothy@epa.gov>
Subject: Re: draft

Ex. 5 Deliberative Process (DP)



U.S. ENVIRONMENTAL PROTECTION AGENCY
FACT CHECK
WWW.EPA.GOV/NEWSROOM

The Hill Gets It Wrong On New EPA FOIA Regulation

EPA has finalized a new regulation which will bring the Agency into compliance with the Congressional amendments to FOIA from 2007, 2009, and 2016. Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations, the Obama administration failed to meet this deadline. Unfortunately, *The Hill* ran a grossly inaccurate story explaining the new regulation.

THE HILL'S FALSE HEADLINE

New EPA rule would expand Trump officials' powers to reject FOIA requests

BY MIRANDA GREEN - 06/25/19 09:50 AM EDT

154 COMMENTS

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/25/2019 5:11:43 PM
To: Schiermeyer, Corry [schiermeyer.corry@epa.gov]
Subject: draft



U.S. ENVIRONMENTAL PROTECTION AGENCY
FACT CHECK
WWW.EPA.GOV/NEWSROOM

The Hill Gets It Wrong On New EPA FOIA Regulation

EPA has finalized a new regulation which will bring the Agency into compliance with the Congressional amendments to FOIA from 2007, 2009, and 2016. Congress provided all federal departments and agencies until the end of 2016 to update their FOIA regulations, the Obama administration chose to ignore this direction and continued to obscure the FOIA process.

Ex. 5 Deliberative Process (DP)

THE HILL'S FALSE HEADLINE

New EPA rule would expand Trump officials' powers to reject FOIA requests

BY MIRANDA GREEN - 06/25/19 09:59 AM EDT

155 COMMENTS

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/24/2019 6:45:38 PM
To: Grandoni, Dino [Dino.Grandoni@washpost.com]; Press [Press@epa.gov]
Subject: RE: Questions from Washington Post about new FOIA rule

Hey Dino, the third question we can answer but might take a bit of time to compile. Are you looking as a whole or comparatively the first 2.5 years or each admin?

Also here is for the other two. We don't comment on pending litigation. And for the other question.

"Last week, the Agency held a briefing for the Senate Judiciary Committee where staff were given the opportunity to ask any questions they had about the updated rule, these questions were answered by the top two career officials who run EPA's FOIA program. After many years of delay, EPA's FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. As we have said this rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false." – **Michael Abboud, EPA spokesman**

From: Grandoni, Dino <Dino.Grandoni@washpost.com>
Sent: Wednesday, July 24, 2019 2:27 PM
To: Press <Press@epa.gov>
Subject: Questions from Washington Post about new FOIA rule

Hi all,

Hope you're well. I'm writing in because I'm writing a story about EPA's (and Interior Department's) FOIA practices.

- 1) Does the EPA have a response to the lawsuit filed today by the Center for Biological Diversity and Environmental Integrity Project regarding the EPA's soon-to-be-finalized FOIA regulation?
- 2) Has Administrator Wheeler replied to the letter sent by Sens. Grassley, Leahy, Cornyn and Feinstein regarding the EPA rule?
- 3) Can you provide with updated figures on the number of FOIA requests during the Trump administration vs. Obama administration (in order to demonstrate for readers the uptick of requests the agency is dealing with)? Is that uptick one of the reasons for the new FOIA regulations?

Let me know if you have any questions for me -- **Ex. 6** Planning to publish tomorrow morning.

All the best,
Dino

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/24/2019 6:30:43 PM
To: Willey, Katharine [willey.katharine@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]
Subject: Re: Greenwire: Looming FOIA rule triggers lawsuits, legislation

Ex. 5 Deliberative Process (DP)

On Jul 24, 2019, at 2:30 PM, Willey, Katharine <willey.katharine@epa.gov> wrote:

Ex. 5 Deliberative Process (DP)

From: Abboud, Michael
Sent: Wednesday, July 24, 2019 2:06 PM
To: Willey, Katharine <willey.katharine@epa.gov>; Brazauskas, Joseph <brazauskas.joseph@epa.gov>
Subject: FW: Greenwire: Looming FOIA rule triggers lawsuits, legislation

Ex. 5 Deliberative Process (DP)

From: Mangum, Emily
Sent: Wednesday, July 24, 2019 2:05 PM
To: AO OPA Individual News Clips <AO_OPA_Ind_News_Clips@epa.gov>
Subject: Greenwire: Looming FOIA rule triggers lawsuits, legislation

Greenwire

Looming FOIA rule triggers lawsuits, legislation

<https://www.eenews.net/greenwire/2019/07/24/stories/1060783309>

Kevin Bogardus 7/24/19

EPA's new regulation on how to handle Freedom of Information Act requests has sparked litigation and legislation.

The rule, which goes into effect Friday, has come under scrutiny for stating that top political appointees have authority to make final determinations on how the agency responds to public records requests as well as routing those requests through headquarters.

The Center for Biological Diversity and Environmental Integrity Project challenged the rule in a lawsuit filed today.

Margaret Townsend, CBD's open-government attorney, told E&E News that EPA's regulation was an attempt to keep Americans in the dark about the Trump administration failing to protect the environment.

"EPA officials issued this rule without any public comment opportunity because they knew people wouldn't stand for it," Townsend said.

"We have a right to know what EPA is trying to hide and which Trump appointee is trying to hide it," she said.

In their lawsuit filed in the U.S. District Court for the District of Columbia, the groups allege that EPA violated FOIA as well as the Administrative Procedure Act with the regulation. They ask the court to vacate the rule and other FOIA directives at EPA until the agency follows the proper rulemaking procedures.

The lawsuit also challenges language included in EPA's FOIA regulation that says political appointees can withhold a portion of a record responsive to a request on "the basis of responsiveness."

Critics of the rule contend it is illegal, pointing to a U.S. Court of Appeals for the D.C. Circuit opinion issued in 2016 that found no basis in the law that agencies can redact particular information within a responsive record.

Others are joining in litigation against the rule. Citizens for Responsibility and Ethics in Washington, an ethics watchdog group, yesterday filed a lawsuit against the regulation in the same court.

In the complaint, the group says the FOIA process has already been politicized at the Trump EPA and that its new rule will lead to further delays to responses to CREW's FOIA requests filed with the agency. In addition, CREW says EPA doesn't provide any analysis on why its rule precludes requesters from filing FOIA requests with the agency's regional offices and instead requires them to submit requests to its national FOIA office in headquarters, which has a much heavier backlog of requests. The group asks that the court vacate the rule.

"The EPA's hastily adopted FOIA rule is a direct attack on government transparency and pretty clearly violates not only basic rulemaking procedures, but also the letter and spirit of FOIA," said CREW spokesman Aaron Rodriguez.

"We're suing because political appointees should never be authorized to act as gatekeepers to critical information that the American public is entitled to. This lawsuit should also serve as a message to all federal agencies that they cannot dodge legally mandated rulemaking requirements in an attempt to avoid public scrutiny."

The agency has defended its new FOIA rule, saying it was needed in order to comply with amendments made by Congress to the public records law. In addition, the agency could proceed with no public comment period for the regulation because it was required by law and reflected internal changes, EPA has said.

"After many years of delay, EPA's FOIA regulations are now in line with the congressionally mandated changes to the statute, and EPA has no plans to withdraw the finalized rule," said EPA spokesman Michael Abboud.

"As we have said, this rule will enhance transparency and efficiency of responses to FOIA requests," he said. "Allegations made that the rule is changing the political appointees' role in FOIA are false."

EPA's FOIA rule has also led to legislation from Capitol Hill.

Yesterday, Sens. Chuck Grassley (R-Iowa), Patrick Leahy (D-Vt.), John Cornyn (R-Texas) and Dianne Feinstein (D-Calif.) introduced a bill targeting the regulation. The measure would codify the D.C. Circuit opinion and ensure agencies couldn't deem part of records as "non-responsive," countering that language in EPA's regulation.

Abboud said last week the agency held a briefing for the Senate Judiciary Committee where staff members could ask any questions they had about the updated rule.

"These questions were answered by the top two career officials who run EPA's FOIA program," Abboud said.

The bill follows a letter sent by the same senators earlier this week that said EPA's FOIA regulation appears "to run contrary to the letter and spirit of FOIA, thus undermining the American people's right to access information from the EPA." They asked that Administrator Andrew Wheeler reconsider the rule (E&E Daily, July 23).

In their letter, the senators also said the new regulation appears to run against earlier Trump EPA guidance on FOIA requests. They cited a memo by EPA Chief of Staff Ryan Jackson issued in November 2018 that gave guidelines for political appointees reviewing FOIA responses, known as "awareness review."

"We note that the EPA's operative memorandum setting forth the agency's 'awareness notification process' — by which senior agency officials are made aware of the release of certain information through FOIA — makes clear that such a process is 'not an approval process' and that 'FOIA staff ... determine whether information should be released or withheld' under FOIA," the senators said.

"This new rule, however, appears to supersede that memorandum, affirming political appointees' power to decide what information is released or withheld in response to FOIA requests."

The senators' bill also takes issue with a recent Supreme Court ruling on FOIA, which gave agencies more power to shield confidential business information under the law. The legislation would restore an earlier interpretation of that FOIA exemption that was tossed out by the high court (Greenwire, June 24).

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/24/2019 5:15:10 PM
To: Miranda Green [mgreen@thehill.com]; Press [Press@epa.gov]
Subject: RE: Lawsuit against EPA challenging the new EPA FOIA regulation

Hey Miranda, we don't comment on pending litigation. But you have our other statements on the rule as well.

From: Miranda Green <mgreen@thehill.com>
Sent: Wednesday, July 24, 2019 1:01 PM
To: Press <Press@epa.gov>
Subject: Fwd: Lawsuit against EPA challenging the new EPA FOIA regulation

Looking for comment on one of two lawsuits filed today against EPA FOIA policy.

Thanks,
Miranda

----- Forwarded message -----

From: Chris Sproul <envirosproul@gmail.com>
Date: Wed, Jul 24, 2019 at 12:22 PM
Subject: Lawsuit against EPA challenging the new EPA FOIA regulation
To: <mgreen@thehill.com>

Ms. Green,

Given your past story on EPA's new FOIA regulation, I thought you would be interested in the lawsuit we filed against EPA this morning. See the below and attached. Can you please let us know if you decide to write a story on this?

Thanks!

--Chris Sproul

Environmental Groups Sue Environmental Protection Agency
for New Regulations Implementing Freedom of Information Act
That Seek to Hide Information From the Public

(San Francisco, CA) -- A lawsuit filed today in the Federal District Court in Northern California against the Environmental Protection Agency (EPA) claims that EPA's new regulations implementing the Freedom of Information Act (FOIA) are illegal. These regulations, promulgated without legally required public input, are intended to prevent the public from successfully submitting FOIA requests, hide information the public requests under FOIA, and further slow EPA's response to FOIA requests, which already often takes years.

Plaintiffs in the lawsuit are Ecological Rights Foundation (ERF) and Our Children's Earth Foundation (OCE), two California based organizations focused on preventing environmental harm. ERF and OCE both have long histories of making FOIA requests to EPA to ensure that polluting industry actors are being held accountable, that EPA is properly enforcing environmental laws, and that EPA is acting ethically and in accordance with good governance.

Today's lawsuit is the latest action in the campaign to get EPA to comply with FOIA. ERF has recently filed two lawsuits, one in San Francisco and one in Washington, D.C., challenging specific EPA failures to comply with five individual requests as well as its pattern and practice of violating FOIA more generally.

"EPA has been thumbing its nose at FOIA compliance for years. However, it has recently ramped up this disregard for the law with formal policies, and now new regulations, that seek to deprive the public of the information that is their right under FOIA," said Christopher Sproul, Lead Attorney who filed the lawsuit. "The fact that EPA didn't even give the public a chance to comment on these changes adds insult to injury. EPA flatly doesn't care what the people think and is doing everything it can to avoid telling them what it is doing."

Today's lawsuit identifies several specific instances where EPA's new FOIA regulations violate the law. These include:

- EPA will now centralize its FOIA processing activities at its Washington, D.C. Headquarters, which will reduce the number of staff working on fulfilling requests, provide increased opportunity for political interference, and further slow the already interminable delays in EPA's FOIA processing.
- EPA purports to allow the EPA Administrator (currently Andrew Wheeler) to make FOIA determinations in the first instance, but FOIA is structured to avoid this result. EPA's decision introduces political inference into the objective FOIA determination process and removes a statutorily mandated appeals process.
- EPA purports to make the "date-of-request" the presumptive search cut-off date for FOIA requests, but this ignores that EPA virtually never meets its statutory 20-day determination deadline, meaning that records received after months or years of additional delay are stale by the time they are provided to the requester.
- EPA purports to allow itself to withhold portions of records even where it admits that those portions are not subject to one of FOIA's nine exclusive exemptions.

EPA's decision to promulgate these regulations without providing the public with notice and an opportunity to comment ignores explicit statutory notice and comment requirements in both FOIA and the Administrative Procedure Act.

-- Chris Sproul

--

Christopher A. Sproul
Environmental Advocates
5135 Anza Street
San Francisco, California 94121
(415) 533-3376
Fax: (415) 358-5695
Email: csproul@enviroadvocates.com

--

Miranda Green
Energy and Environment Reporter, The Hill
202-999-0660
mgreen@thehill.com
[@mirandacgreen](#)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/11/2019 9:45:54 PM
To: Norberto Santana [nsantana@voiceofoc.org]
Subject: RE: Press inquiry about recent changes to EPA rule on FOIA requests

Just sent you a second email on the last two questions. On the first, you are correct. Call me if you have anymore questions.

Michael Abboud
U.S. Environmental Protection Agency
Office of Public Affairs

Ex. 6 Personal Privacy (PP)

From: Norberto Santana <nsantana@voiceofoc.org>
Sent: Thursday, July 11, 2019 5:27 PM
To: Abboud, Michael <abboud.michael@epa.gov>
Subject: Re: Press inquiry about recent changes to EPA rule on FOIA requests

Michael,

Thanks for your quick response.

So your point is these political appointees always had the ability to be in the process, your rule just codifies that and names them?

It does seem that the effort to centralize requests does have the potential to politicize the FOIA process, regardless of administration.

Would appreciate your thoughts on that.

Lastly, why did EPA not allow public comment on the rule?

Again,

Thanks for engaging and your quick response.

Best,

Norberto

Norberto Santana, Jr.
Publisher

P.O. Box 10020 | Santa Ana, CA 92711

949-374-0402 | nsantana@voiceofoc.org

On Jul 11, 2019, at 2:06 PM, Abboud, Michael <abboud.michael@epa.gov> wrote:

“After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. This rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” – **Michael Abboud, EPA spokesman**

I also would refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>

<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

Sent from my iPhone

On Jul 11, 2019, at 4:49 PM, Norberto Santana <nsantana@voiceofoc.org> wrote:

I am a reporter workign on deadline regarding the new changes to FOIA requests at EPA.

I have seen concerns by environmental groups and recent coverage in the Hill.

I would like to get a statement from EPA on the new rule.

Would also welcome a chance to speak to an EPA spokesperson on the rule.

My dealine is Friday.

Thanks,

Norberto

Norberto Santana, Jr.
Publisher

P.O. Box 10020 | Santa Ana, CA 92711

949-374-0402 | nsantana@voiceofoc.org

<PastedGraphic-1.pdf>

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/10/2019 7:00:06 PM
To: Dawn Reeves [dreeves@iwpnews.com]; Press [Press@epa.gov]
Subject: RE: question about FOIA letter

New statement for your story:

“After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. This rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” – **Michael Abboud, EPA spokesman**

From: Dawn Reeves <dreeves@iwpnews.com>
Sent: Tuesday, July 9, 2019 3:23 PM
To: Abboud, Michael <abboud.michael@epa.gov>; Press <Press@epa.gov>
Subject: RE: question about FOIA letter

Thanks Michael.

From: Abboud, Michael <abboud.michael@epa.gov>
Sent: Tuesday, July 9, 2019 3:04 PM
To: Dawn Reeves <dreeves@iwpnews.com>; Press <Press@epa.gov>
Subject: RE: question about FOIA letter

Hey Dawn, I refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>
<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

From: Dawn Reeves <dreeves@iwpnews.com>
Sent: Tuesday, July 9, 2019 2:30 PM
To: Press <Press@epa.gov>
Subject: question about FOIA letter

Hi,
It's Dawn Reeves. I'm writing about the attached letter asking EPA to delay implementation of its new FOIA rules. Wondering if you would consider this and/or have a response.
Please let me know – deadline at 3:30.
Thanks!
Dawn

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 7/10/2019 6:59:43 PM
To: Miranda Green [mgreen@thehill.com]; Press [Press@epa.gov]
Subject: RE: Comment on two letters on FOIA rule

New statement for your story:

“After many years of delay, EPA’s FOIA regulations are now in line with the Congressionally mandated changes to the statute and EPA has no plans to withdraw the finalized rule. This rule will enhance transparency and efficiency of responses to FOIA requests. Allegations made that the rule is changing the political appointees role in FOIA are false and irresponsible.” – **Michael Abboud, EPA spokesman**

From: Abboud, Michael
Sent: Wednesday, July 10, 2019 12:49 PM
To: Miranda Green <mgreen@thehill.com>; Press <Press@epa.gov>
Subject: RE: Comment on two letters on FOIA rule

I refer you back to our previous releases on this which address similar concerns.

<https://www.epa.gov/newsreleases/epas-response-society-environmental-journalists>
<https://www.epa.gov/newsreleases/hill-gets-it-wrong-new-epa-foia-regulation>

From: Miranda Green <mgreen@thehill.com>
Sent: Wednesday, July 10, 2019 12:48 PM
To: Press <Press@epa.gov>
Subject: Comment on two letters on FOIA rule

Looking for comment on this letter from Rep. Katie Porter sent yesterday: <https://porter.house.gov/sites/porter.house.gov/files/Porter%20Letter%20to%20Wheeler%20re%20FOIA.pdf>

And this letter sent from SEJ and 38 media groups: <https://www.rcfp.org/wp-content/uploads/2019/07/7-9-19-News-Media-Coalition-Letter-to-EPA-re-FOIA-Reg-Amendments.pdf>

Thanks,
Miranda

--

Miranda Green
Energy and Environment Reporter, The Hill
202-999-0660
mgreen@thehill.com
[@mirandacgreen](#)

Message

From: Abboud, Michael [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B6F5AF791A1842F1ADCC088CBF9ED3CE-ABBOUD, MIC]
Sent: 6/26/2019 5:04:34 PM
To: Jackson, Ryan [jackson.ryan@epa.gov]; Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; McFaul, Jessica [mcfaul.jessica@epa.gov]; Konkus, John [konkus.john@epa.gov]; Beach, Christopher [beach.christopher@epa.gov]
Subject: FW: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"
Attachments: Administrator Wheeler_SEJ_June262019.pdf

Ex. 5 Deliberative Process (DP)

From: Meaghan Parker <mparker@sej.org>
Sent: Wednesday, June 26, 2019 12:55 PM
To: Wheeler, Andrew <wheeler.andrew@epa.gov>
Cc: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Mutz, John (Fletcher) <mutz.john@epa.gov>; Creech, Christopher <Creech.Christopher@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Abboud, Michael <abboud.michael@epa.gov>
Subject: Society of Environmental Journalists Letter re: "Freedom of Information Act Regulations Update"

Dear Administrator Wheeler:

The Society of Environmental Journalists (SEJ) objects to EPA's June 26 Final Rulemaking entitled "Freedom of Information Act Regulations Update." It enables the agency to limit public access to EPA records that are legally public information. Moreover, the highly irregular procedure of issuing a final rule without proposal or public comments is unjustified and unlawful under the Administrative Procedure Act (APA).

SEJ is a professional and educational organization that represents 1,400 environmental journalists, professors and students. Our members, on behalf of the public, rely on FOIA to help the public understand the work of the U.S. Environmental Protection Agency. We are deeply concerned that the published FOIA rule changes will seriously harm the public's right to know.

Your claim to exempt this rulemaking from normal APA proposal-and-comment procedures is highly unusual and unwarranted. Moreover, we believe that it serves only to shield highly political decisions from public scrutiny. Neither the procedural nor the good cause exemptions to the APA apply to important parts of this rulemaking — which go beyond required updates to the regulation to drastically change EPA's handling of information requests. We strongly disagree with EPA's assertion that public discussion of this rulemaking is "impracticable, unnecessary, or contrary to the public interest." Circumventing the usual public comment process is a violation of the public trust and silences the voices of the citizens the EPA is bound to protect.

One of the rule's most worrisome changes grants authority to the Administrator (and a hierarchy of other political appointees) to determine which records are "responsive" to a FOIA request. This determination takes place entirely before the records are reviewed or redacted for legitimate FOIA exemptions. It is arbitrary and invisible, and virtually impossible to appeal, because the agency need not disclose to the requester what records were initially found or why they were deemed non-responsive. This provision badly distorts the true and proper meaning, under FOIA, of "responsiveness."

Another disturbing change centralizes final authority to grant or deny FOIA requests in the political parts of EPA headquarters. By altogether removing the authority of Regional Offices to grant FOIA requests, this change will slow and hobble the agency's already poor performance, in addition to politicizing the decision-making process.

The rule furthermore tries to legitimize the placement of the National FOIA Office under the Office of General Counsel. This is contrary to recent statutory changes, which emphasize the independence of the agency's Chief FOIA Officers.

Many of our members report that EPA's lack of speedy handling of, and responsiveness to, FOIA requests already makes it difficult for them to do their job of informing the public about the environment in which they live. This new rule, we believe, will make that job even more difficult. It will impede the public's access to environmental information and its right to know how tax dollars are spent.

We call on you to withdraw this rule and submit it for standard notice and comment as a proposal — thereby allowing a proper, meaningful public evaluation of its consequences.

Sincerely,
Meaghan E. Parker
Executive Director

Cc: leopold.matt@epa.gov
mutz.john@epa.gov
creech.christopher@epa.gov
schiermeyer.corry@epa.gov
abboud.michael@epa.gov

Meaghan Parker
Executive Director
Society of Environmental Journalists
P:(202) 558-2033 E: mparker@sej.org





Society of Environmental Journalists

1629 K Street NW, Suite 300, Washington, DC 20006
Phone: 202-558-2055 • sej@sej.org • www.sej.org

June 26, 2019

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Meaghan E. Parker



The Honorable Andrew Wheeler
Office of the Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. Mail Code: 1101A
Washington, DC 20460
wheeler.andrew@epa.gov

Dear Administrator Wheeler:

The Society of Environmental Journalists (SEJ) objects to EPA's June 26 Final Rulemaking entitled "Freedom of Information Act Regulations Update." It enables the agency to limit public access to EPA records that are legally public information. Moreover, the highly irregular procedure of issuing a final rule without proposal or public comments is unjustified and unlawful under the Administrative Procedure Act (APA).

SEJ is a professional and educational organization that represents 1,400 environmental journalists, professors and students. Our members, on behalf of the public, rely on FOIA to help the public understand the work of the U.S. Environmental Protection Agency. We are deeply concerned that the published FOIA rule changes will seriously harm the public's right to know.

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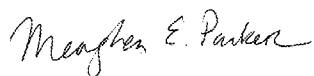
Another disturbing change centralizes final authority to grant or deny FOIA requests in the political parts of EPA headquarters. By altogether removing the authority of Regional Offices to grant FOIA requests, this change will slow and hobble the agency's already poor performance, in addition to politicizing the decision-making process.

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We call on you to withdraw this rule and submit it for standard notice and comment as a proposal — thereby allowing a proper, meaningful public evaluation of its consequences.

Sincerely,



Meaghan E. Parker
Executive Director

CC: Matthew Z. Leopold, General Counsel
Christopher T. Creech
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (Mail Code: 2310A)
Washington, DC 20460
leopold.matt@epa.gov
mutz.john@epa.gov
creech.christopher@epa.gov

Corry Schiermeyer, Associate Administrator
Office of Public Affairs
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (Mail 1701A)
Washington, DC 20460
schiermeyer.corry@epa.gov
abboud.michael@epa.gov

Message

Sent: 6/25/2019 5:04:37 PM
To: Kaufman, Ellie [Ellie.Kaufman@turner.com]; Press [Press@epa.gov]
Subject: RE: CNN INQUIRY

If you are reporting off of The Hill story on this issue, we have asked The Hill to retract their story as it is completely inaccurate.

-----Original Message-----

From: Kaufman, Ellie <Ellie.Kaufman@turner.com>
Sent: Tuesday, June 25, 2019 12:44 PM
To: Press <Press@epa.gov>
Subject: CNN INQUIRY

Hello,

I see that a final rule regarding the FOIA process is going into effect tomorrow. Can you tell me more about this rule? Why is EPA updating the FOIA rule? What are the major changes?

Thanks!

Ellie Kaufman
CNN Washington

Ex. 6 Personal Privacy (PP)

Sent from iPhone